APPENDIX A

COURT OF APPEALS OF MARYLAND

No. 52, Sept. Term, 1992

WASHINGTON SUBURBAN SANITARY COMMISSION

v.

CAE-LINK CORPORATION *et al.*

April 8, 1993

Richard J. Magid, William F. Ryan, Jr. (Whiteford, Taylor & Preston, both on brief), Baltimore, for petitioner.

David H. Bamberger (Leonard L. Gordon, Piper & Marbury, all on brief), Washington, DC, David L. Rutland, Annapolis, for respondent.

Argued before MURPHY, C.J., and RODOWSKY, McAULIFFE, CHASANOW, KARWACKI, ROBERT M. BELL and CHARLES E. ORTH, Jr., (retired, specially assigned), JJ.

ROBERT M. BELL, Judge.

We granted certiorari to consider whether, as the Court of Special Appeals held, *CAE-Link Corp. v. WSSC*, 90 Md.App. 604, 602 A.2d 239, *cert. granted*, 327 Md. 304, 609 A.2d 312 (1992), the Washington Suburban Sanitary Commission ("WSSC"),[1] the petitioner, is strictly

[1] The Washington Suburban Sanitary Commission is a bi-county commission responsible for the water and sewage service for Montgomery and Prince George's Counties. *See* Md.Code (1957, 1990 Repl.Vol.) Art. 29, § 1-101 *et seq.*

liable for nuisance as a result of its construction, and operation, of a sewage sludge composting facilitiy pursuant to federal court orders.[2] This issue had its genesis in litigation, initiated in the United States District Court for the District of Columbia in 1973, to rectify an environmental crisis at the Blue Plaints Sewage Treatment Plant, and in consent decrees, to which WSSC was a party, arising out of that litigation.[3]

Pursuant to an order entered by the United States District Court for the District of Columbia, Mongomery County reported that it would dispose of its share of the Blue Plains sludge by building a composting facility on a large tract of undeveloped land adjacent to the Montgomery Industrial Park. That undeveloped tract of land, which was on the Montgomery County-Prince George's County border, was known as Site 2.[4]

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[2] According to the petitioner,

> The sludge is delivered from Blue Plains in sealed trucks. Upon arrival, the sludge is combined with wood chips, and formed into compost piles in the composting building. Air is drawn through the piles for approximately 21 days, after which time the wood chips are removed, and the remaining compost material is cured for 30 days. This results in a finished product which is sold for garden and landscaping uses under the trade name "ComPro."

Petitioner's brief, p. 13. *See Electro-Nucleonics v. WSSC*, 315 Md. 361, 377-78, 554 A.2d 804, 812, *cert. denied*, 493 U.S. 854, 110 S.Ct. 158, 107 L.Ed.2d 115 (1989), for a more complete description of the operation.

[3] The history of the litigation and a detailed description of the various consent decrees is detailed in *United States v. District of Columbia*, 654 F.2d 802 (D.C.Cir.), *cert. denied, sub nom. Prince George's County v. United States*, 454 U.S. 1082, 102 S.Ct. 637, 70 L.Ed.2d 616 (1981).

[4] The court's order was issued after the inability of the parties, *i.e.*, the District of Columbia, Fairfax County, Montgomery County, Prince George's County, the State of Maryland, and WSSC, to reach agreement on a permanent equitable plan for the disposal of sludge produced at the Blue Plains Sewage Treatment Plant

Subsequently, on July 10, 1978, the district court issued an order requiring the user jurisdictions to proceed to develop the designated sites. Montgomery County was ordered to have the Site 2 composting facility operational by July 1, 1979. WSSC thus was required to take all necessary action to accomplish that goal, including acquiring the land and obtaining the necessary permits.

Action by Prince George's County, which opposed development of a composting facility on Site 2, precipitated additional orders. The district court, on April 25, 1980, issued an order compelling WSSC to restore the funds caused to be removed by the WSSC Commissioners from Prince George's County and to move forward with the project. It issued a third order on June 27, 1980, in response to two state court suits filed by Prince George's County. One of those suits challenged the validity of the state sewage sludge permit and alleged that Site 2 was a prospective nuisance. In the other, which alleged that restrictive convenants benefitting the land made acquisition of the Site 2 property so expensive that the WSSC Commissioners would likely be subject to liability for breach of fiduciary duty if they acquired it, the Circuit Court for Prince George's County issued an injunction enjoining WSSC from proceeding with development and ordering it to withdraw purchase offers made to the Site 2 owners. *United States v. District of Columbia,* 654 F.2d 802, 806 (D.C.Cir.), *cert. denied sub nom. Prince George's County v. United States,* 454 U.S. 1082, 102 S.Ct. 637, 70 L.Ed.2d 616 (1981). The district court, reiterating the directives set forth in its prior orders, enjoined WSSC from complying with the state court injunction. It also ordered WSSC to proceed expeditiously to

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resulted in a complaint, by the United States, alleging violation of the Federal Water Pollution Control Act, 33 U.S.C. § 1215 *et seq.* The parties had previously entered into two consent decrees, one dated July 29, 1974 and the other January 24, 1978, with that objective. *United States v. District of Columbia,* 654 F.2d at 804.

obtain the land and build and operate the composting facility. Finally, the court ordered Prince George's County to withdraw from the state court suits, and all parties to refrain from taking any action which would frustrate or impede the execution of its order.

Pursuant to the district court's July 10, 1980 order, WSSC filed, in the Circuit Court of Montgomery County, a condemnation action to acquire Site 2. The 115 acres to which it acquired title were burdened by certain restrictive convenants.[5] Consequently, WSSC filed an action against neighboring landowners, including the respondents, CAE-Link Corporation, AT & T Resource Management Corporation, International Fabricare Institute, Erie Indemnity Company and The Washington Post Company, seeking a declaration that the covenant's beneficiaries need not be compensated for their value. The defendants filed counterclaims for inverse condemnation, breach of covenant, nuisance, bad faith, pursuant to Maryland Rule 1-341, and violation of 42 U.S.C. § 1983, seeking monetary damages. Concluding that the restrictive covenants, which had been extinguished when WSSC condemned the land, were compensable property interests, the trial court denied WSSC declaratory relief.[6]

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[5] The covenants specifically provided that:

> No waste material or refuse may be dumped or permitted to remain upon any part of the property outside of buildings, and that
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> No emission of objectionable odors outside the lot line shall be permitted.

They specifically prohibit the use of the land for a "[d]ump or sanitary fill."

[6] That ruling was certified a final order, *see* Maryland Rule 2-602(a), and WSSC appealed. The Court of Special Appeals affirmed. *See WSSC v. Frankel*, 57 Md.App. 419, 470 A.2d 813 (1984). We granted certiorari and vacated the judgment, noting:

> The difficulty is that most of the Claimants have also requested in their counterclaims monetary judgments for just compensa-

The trial court granted WSSC's motion for summary judgment as to the counterclaims alleging violation of § 1983, bad faith, and punitive damages, but denied it as to inverse condemnation and breach of covenant claims. WSSC was granted partial summary judgment on the nuisance claim to the extent of requiring the respondents to prove that WSSC negligently created the nuisance. At trial, the breach of covenant claims having been dismissed by stipulation of the parties,[7] WSSC moved for judgment on the inverse condemnation and nuisance claims. Denying the motion as to the former, the trial court ruled, as to the latter:

> With respect to the nuisance claim, the motion to dismiss is granted for two reasons. The first reason being that right or wrong I have held that in this case, based upon the facts in this case, that in order to recover on the nuisance theory, the Plantiffs have to show simple negligence in the construction and operation of the facility. There is no evidence that I can recall to support that theory.
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> The second basis upon which I grant the motion on the nuisance, is that the law is set forth not only

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tion, if the circuit court entered an affirmative declaration on the compensability issue. But WSSC's claim for declaratory judgment and the requests of certain Claimants for monetary judgments are one and the same claim for purposes of applying former Md.Rule 605a. Thus, the entire claim has not been adjudicated in the circuit court by the ruling of December 8, 1982.

WSSC v. Frankel, 302 Md. 301, 487 A.2d 651, 655 (1985). Nevertheless, the trial court's ruling undoubtedly is correct. *See Electro-Nucleonics*, 315 Md. at 367, 554 A.2d at 807. In *Mercantile-Safe Deposit & Trust Co. v. Mayor and City Council of Baltimore*, 308 Md. 627, 641, 521 A.2d 734, 740-41 (1987), we held that a restrictive covenant running with the land is a compensable property right, for condemnation purposes, to the extent it adds measurable value to that land to which it is attached.

[7] The parties agreed that the covenants had been extinguished in July of 1980, when WSSC condemned Site 2.

> in [*Maryland Port Administration v.*] *QC* [*Corp.*, 310 Md. 379, 529 A.2d 829 (1987)], but language in *Electro-Nucleonics* [, *Inc. v. WSSC*, 315 Md. 361, 554 A.2d 804, *cert. denied*, 493 U.S. 854, 110 S.Ct. 158, 107 L.Ed.2d 115 (1989)] in that the court can find no substantial diminution in the use of any of these properties by any of the Plaintiffs as the result of the odor.

The inverse condemnation claim was submited to the jury, which returned a verdict in favor of WSSC. The jury found "the covenants extinguished on July 8, 1980 [did not] add measurable value to the respondent's land." Their motion for new trial having been denied, the respondents appealed. WSSC cross-appealed.

The Court of Special Appeals held that, because of its savings clause, the Federal Water Pollution Control Act does not preempt neighboring property owners' state law nuisance claims against WSSC for maintaining a facility that emits noxious odors. *CAE-Link Corp. v. WSSC*, 90 Md.App. 604, 615, 602 A.2d 239, 244, *cert. granted*, 327 Md. 304, 609 A.2d 312 (1992). It also held that nuisance law in Maryland is a matter of strict liability; hence, negligence is not a prerequisite to recovery. *Id.* at 616, 602 A.2d at 244. Additionally, the intermediate appellate court determined that the trial court erroneously instructed the jury that, in determining the value of the respondents' property, for inverse condemnation purposes, it was appropriate to consider whether extinguishment of the covenants substantially interfered with its use and enjoyment. *Id.* at 619, 602 A.2d at 245. Moreover, the court concluded, property appraisals prepared at the request of two of the respondents should not have been admitted under the business records exception. *Id.* at 623, 602 A.2d at 248. On WSSC's cross-appeal, the court reversed the trial court's rulings on "standing." It held that the respondents AT & T, BancTec Systems, Incorporated, and CAE-Link Corporation, which purchased

their property after the land had been condemned. were "late-takers" and lacked standing to maintain an inverse condemnation action. *Id.* at 625-26, 602 A.2d at 249.

Both WSSC and the respondents filed petitions for certiorari. We granted WSSC's petition, but denied the respondents'.

I.

A.

The law of nuisance frequently has been discussed in the opinions of this Court. *See Eanes v. State,* 318 Md. 436, 455 n. 8, 569 A.2d 604, 613 n. 8 (1990); *Tadjer v. Montgomery County,* 300 Md. 539, 552, 479 A.2d 1321, 1327-28 (1984); *Corbi v. Hendrickson,* 268 Md. 459, 464, 302 A.2d 194, 197 (1973); *Slaird v. Klewers,* 260 Md. 2, 9, 271 A.2d 345, 348 (1970); *Stottlemyer v. Crampton,* 235 Md. 138, 143-44, 200 A.2d 644, 646 (1964); *Bishop Processing Co. v. Davis,* 213 Md. 465, 474, 132 A.2d 445, 449 (1957); *Gorman v. Sabo,* 210 Md. 155, 159, 122 A.2d 475, 478 (1956); *Fox v. Ewers,* 195 Md. 650, 658, 75 A.2d 357, 360 (1950); *Meadowbrook Swimming Club, Inc. v. Albert,* 173 Md. 641, 645, 197 A. 146, 148 (1938); *Jackson v. Shawinigan Electro Products Co.,* 132 Md. 128, 136, 103 A. 453, 455-56 (1918); *Northern Cent. Ry. Co. v. Oldenburg & Kelley, Inc.,* 122 Md. 236, 244, 89 A. 601, 605 (1914); *Gallagher v. Flury,* 99 Md. 181, 187, 57 A. 672, 675 (1904); *Euler v. Sullivan,* 75 Md. 616, 618, 23 A. 845, 846 (1892); *Susquehanna Fertilizer Co. v. Malone,* 73 Md. 268, 276, 20 A. 900, 901 (1890); *Woodyear v. Schaefer,* 57 Md. 1, 11-12 (1881); *Mayor and City Council of Baltimore v. Radecke,* 49 Md. 217, 227 (1878); *Adams v. Michael,* 38 Md. 123, 126 (1873); *Scott v. Bay,* 3 Md. 431, 444 (1853). We have held that, "where a trade or business as carried on interferes with the reasonable and comfortable enjoyment by another of his property, a wrong is done to a neighboring owner for

which an action lies. . . ." *Meadowbrook Swimming Club,* 173 Md. at 645, 197 A. at 148. Moreover, "[I]t makes no difference that the business [is] lawful and one useful to the public and conducted in the most approved method." *Bishop Processing Co.,* 213 Md. at 474, 132 A.2d at 449; *Meadowbrook Swimming Club,* 173 Md. at 645, 197 A. at 148. Virtually any disturbance of the enjoyment of the property may amount to a nuisance so long as the interference is substantial and unreasonable and such as would be offensive or inconvenient to the normal person. *Gorman,* 210 Md. at 159, 122 A.2d at 477, quoting *Prosser on the Law of Torts* 406-07 (2nd ed.).

In *Bishop Processing Co.,* the defendant, owner and operator of a processing plant, was enjoined from maintaining and operating its plant because the odors emanating from it interfered with the plaintiffs' lawful use and enjoyment of their properties. 213 Md. at 468-69, 132 A.2d at 446. Unreasonable noise from the continuous playing of a radio was the subject of the suit brought by the plaintiffs in *Gorman.* Although there was no claim for damages to the property, nor for diminution of its value, the Court held that the loud and offensive sounds interfered seriously with the plaintiffs' ordinary comfort and enjoyment of their property and, thus, constituted a private nuisance, for which actual and punitive damages would lie. 210 Md. at 162-64, 122 A.2d at 478-79. We opined: although the property may not be depreciated in its salable or market value, "it is the discomfort and annoyance in its use for purposes which is the primary consideration in allowing damages." *Id.* at 163, 122 A.2d at 479, quoting *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church,* 108 U.S. 317, 335, 2 S.Ct. 719, 731, 27 L.Ed. 739, 746 (1883). In *Meadowbrook Swimming Club,* the defendant operated a place of amusement which played amplifier enhanced dance music six nights per week. An injunction against that activity was upheld because the noise alone caused a number of residents and property owners actual physical discomfort and

annoyance, thus constituting a nuisance. 173 Md. at 643-44, 197 A. at 147.

Maryland has long adhered to the rule that proof of nuisance focuses not on the possible negligence of the defendant but on whether there has been unreasonable interference with the plaintiff's use and enjoyment of his or her property. *See Susquehanna Fertilizer Co.*, 73 Md. at 276, 20 A. at 901. To prove the existence of a nuisance, therefore, the complained of interference must cause actual physical discomfort and annoyance to those of ordinary sensibilities, tastes and habits, *Fifth Baptist Church*, 108 U.S. at 335, 2 S.Ct. at 731, 27 L.Ed. at 745-46; it must interfere seriously with the ordinary comfort and enjoyment of the property. *Bishop Processing Co.*, 213 Md. at 474, 132 A.2d at 449; *Gorman*, 210 Md. at 159, 122 A.2d at 478; *Meadowbrook Swimming Club*, 173 Md. at 645, 197 A. at 148.

B.

WSSC concedes that, in Maryland, nuisance is a matter of strict liability and that "liability for nuisance may arise even where there is compliance with applicable laws and authorized or permitted (as opposed to mandated) by state statute." Petitioner's reply brief at 2. Nevertheless it contends that it should not be held strictly liable that it should not be held strictly liable in this case solely because of its good faith, and nonnegligent, execution of emergency and mandatory orders of the district court directing it to build and operate a sewage sludge composting facility at Site 2. It asks this Court to sanction an exception, given the unique circumstances of this case.

Under the circumstances of this case, WSSC argues, strict liability for nuisance is inapplicable because its actions were not voluntarily undertaken; rather than receive a "mere naked grant of power," the district court ordered it to build and operate a specific type of sludge composting facility, at a specific location and by a specific date.

It relies on *Toy v. Atlantic Gulf & Pacific Co.*, 176 Md. 197, 213, 4 A.2d 757, 765 (1939), for the proposition that "[t]he basic concept underlying the rule [of strict liability for maintaining a dangerous condition] is that a *person who elects* to keep or bring upon his land something that exposes the adjacent land or its owner or occupant to an added danger should be obliged to prevent its doing damage." (emphasis added). It also contends that it should not be placed in a position where good faith compliance with one court's order should cause it to be held strictly liable in another.

In *Toy*, the defendant, a company hired by the federal government to dredge the Chesapeake and Delaware Canal, deposited the dredged material on an embankment constructed for that purpose. That embankment was on the west side of Back Creek and across from the plaintiff's land. The plaintiffs used that waterway to transport carp by boat to their land. 176 Md. at 201, 4 A.2d at 759-60. A substantial amount of the dredged material and a portion of the embankment collapsed into the creek and denied the plaintiffs access to their property by boat and interfered with their operation of a pond constructed on their property for raising carp. *Id.* at 207, 4 A.2d at 760.

Initially, we note, as did the *Toy* Court, that the action before it was for negligence, not, as in the case *sub judice*, nuisance. *Id.* at 208, 4 A.2d at 763. There is, of course, a distinction between nuisance and negligence. *See Sherwood Bros, Inc. v. Eckhard*, 204 Md. 485, 493, 105 A.2d 207, 211 (1954). In *Toy*, the Court did address the "doctrine of liability without fault," as enunciated in *Rylands v. Fletcher*, 1866, L.R. 1 Ex. 265, 279, *aff'd*, 1868, L.R. 3 H.L. 30. Pursuant to that doctrine,

> [T]he person who, for his own purposes, brings in his lands and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril; and if he does not do so, is *prima facie*

> answerable for all the damage which is the natural consequence of its escape.

This doctrine addresses a different situation from that *sub judice, see also Yommer v. McKenzie,* 255 Md. 220, 257 A.2d 138 (1969), as the Court's discussion of private nuisance reveals:

> If the defendant had caused the earth and debris to be cast into the channel opposite the shore of the plaintiffs, and so filled it that the plaintiffs' limited navigable access to their shore and dam had been materially affected or destroyed, so that they had sustained damages which were so special and peculiar to their property as to make them substantially different from those suffered by the public generally, the plaintiffs would have a cause of action against the defendant on the theory of the unlawful creation of a private nuisance, since its existence *does not necessarily presuppose negligence* but may arise from an unlawful act.

176 Md. at 214, 4 A.2d at 766 (emphasis added).

The case *sub judice* is more closely akin to *Taylor v. Mayor and City Council of Baltimore,* 130 Md. 133, 99 A. 900 (1917). There, pursuant to state law, the City of Baltimore erected a sewage disposal plant 1500 feet from the plaintiff's property, on which a hotel and a dance and dining pavilion were located. The plaintiff brought an action for nuisance seeking damages for injuries to her property. *Id.* at 134, 99 A. at 901. After determining that the city had not "taken" the plaintiff's property, the Court framed the issue as "Whether the appellee, a municipal corporation, is liable under the facts and circumstances above . . ., which would amount to a nuisance if done by a private corporation, or individuals—even if done by legislative authority." *Id.* at 143, 99 A. at 904. Answering in the affirmative, we said, "[t]he delegation of a power to do an act, whilst conferring full authority to perform the act itself, does not, therefore, without

more, essentially and without exception, carry the right to so do it as to inflict loss or injury upon an innocent individual." 130 Md. at 145, 99 A. at 904. Accordingly, the *Taylor* Court held that the City could be held liable for nuisance even though the construction of the sewage disposal plant did not result in a taking of plaintiff's property and was done pursuant to State authority. *Id.* at 142-43, 99 A. at 906. *See Bd. of Educ. v. Riverdale,* 320 Md. 384, 388, 578 A.2d 207, 209 (1990). See also *Richards v. Washington Terminal Co.,* 233 U.S. 546, 556-58, 34 S.Ct. 654, 658, 58 L.Ed. 1088, 1092-93 (1914), which addressed a similar issue.

There, the plaintiff owned a residence abutting railroad tracks and near a railroad tunnel. That residence, which had been let to a tenant, was damaged by the volumes of dense black or grey smoke, dust and dirt, cinders and gases emitted from the trains while passing over the tracks, going into or coming out of the tunnel, or standing on the tracks. Vibrations from the train also damaged the house. As a result, the property depreciated in value and the plaintiff, unable then to rent the house, was forced to occupy it himself. *Id.* at 549-50, 34 S.Ct. at 655, 58 L.Ed. at 1089-90. The Supreme Court held that the plaintiff had not been wholly excluded from the use and enjoyment of his property and, hence, no "taking" occurred in the ordinary sense. The Court noted, however, that "while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use." *Id.* at 553, 34 S.Ct. at 657, 58 L.Ed. at 1091. (citations omitted).

Addressing what is to be deemed a private nuisance that amounts to a taking, the Court referred to *Baltimore & Potomac Railroad Company v. Fifth Baptist Church,* 108 U.S. 317, 2 S.Ct. 719, 27 L.Ed. 739 (1883). In that case, the railroad was immune from a private action

by the church based upon inconveniences incidentally and unavoidably related to its operation of a railroad. Nevertheless, the Court pointed out that the church, in that case, had a cause of action "where a building for housing and repairing locomotive engines was unnecessarily established in close proximity to . . . [it] and [was] so used [as to] create[] a constant disturbance of the religious exercises." *Richards*, 233 U.S. at 555, 34 S.Ct. at 658, 58 L.Ed. at 1092. The Court therefore reasoned:

> "Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion."

Id. at 556, 34 S.Ct. at 658, 58 L.Ed. at 1092 quoting *Fifth Baptist Church*, 108 U.S. at 331, 2 S.Ct. at 728, 27 L.Ed. at 744. It further opined that congressional authority could not

> "be invoked to justify acts, creating physical discomfort and annoyace to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyance."

Id.

In *Fifth Baptist Church*, the option of where to locate the repair shop and engine house rested with the railroad, while, in *Richards*, "the location of the tunnel and its south portal was established pursuant to law, and not voluntarily chosen by defendant." *Id.*, 233 U.S. at 557, 34 S.Ct. at 658, 58 L.Ed. at 1093. That distinction was insufficient to require a different result in *Richards* than in *Fifth Baptist Church*, however. As to

> such damage as is attributable to the gases and smoke emitted from locomotive engines while in the tunnel, and forced out of it by means of the fanning system through a portal located so near to plaintiff's

> property that these gases and smoke materially contribute to injure the furniture and to render the house less habitable than otherwise it would be,

Richards, 233 U.S. at 551, 34 S.Ct. at 656, 58 L.Ed. at 1090, the Court explained:

> Construing the acts of Congress in the light of the Fifth Amendment, they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him. If the damage is not preventable by the employment at reasonable expense of devices such as have been suggested, then plaintiff's property is "necessary for the purposes contemplated," and may be acquired by purchase or condemnation . . . and pending its acquisition defendant is responsible. If the damage is readily preventible, the statute furnishes no excuse, and defendant's responsibility follows on general principles.

233 U.S. at 557, 34 S.Ct. at 658, 58 L.Ed. at 1093 (citation omitted).

The district court ordered WSSC to build a sewage sludge composting facility in Montgomery County, Maryland. It did not select the site—Montgomery County, one of the two counties for which WSSC has responsibility for sewage, did that, *see United States v. District of Columbia,* 654 F.2d 802, 804 (D.C.Cir.), *cert. denied sub nom Prince George's County v. United States,* 454 U.S. 1082, 102 S.Ct. 637, 70 L.Ed.2d 616 (1981)—nor mandate how, as opposed to when, the construction would proceed. WSSC acquired the land, and was solely responsible for the development of the facility.[8] While the

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[8] The respondents take issue with WSSC's characterization of its role in the development process. It contends that, far from being a helpless recipient of a federal court order, WSSC sought "a clear set of marching orders" so as to avoid problems which it perceived to exist, from the beginning. Indeed, the respondents suggest, and

district court expedited the construction, it was the petitioner that created the nuisance. A strict liability standard should apply. "[The United States District Court for the District of Columbia] can not be presumed, from general grant of authority, to have intended to sanction or legalize any acts or any use of property that will create a private nuisance which will injuriously affect the property of another." *Taylor*, 130 Md. at 145, 99 A. at 905 (quoting *Mayor and City Council of Baltimore v. Fairfield Impro. Co.*, 87 Md. 352, 362, 39 A. 1081, 1083 (1898)). *See also Webb v. Town of Rye*, 108 N.H. 147, 230 A.2d 223 (1967) (statutory duty of town to provide and maintain public facilities for depositing garbage and refuse did not sanction the creating and maintenance of a nuisance); *Jones v. Knox County*, 205 Tenn. 561, 327 S.W.2d 473 (1959) (although acting in governmental capacity, county is not authorized to maintain a public nuisance in form of sewage treatment plant).

II.

A.

The supremacy clause to the United States Constitution, Article VI, clause 2, provides: "This constitution, and the laws of the United States . . . shall be the supreme law of the land. . . ." This clause has been interpreted to mean that "state laws which 'interfere with, or are contrary to the laws of Congress, made pursuant to the constitution' are invalid." *Wisconsin Public Intervenor v. Mortier*, —— U.S. ——, ——, 111 S.Ct. 2476, 2481, 115 L.Ed.2d 532, 542 (1991) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 211, 6 L.Ed. 23, 73 (1824)). The Supreme Court has identified three situations in which

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the record supports, that it was WSSC which requested the district court to order it to acquire Site 2 to expedite the process. The respondents argue, therefore, that WSSC is not entitled to any special consideration in light of the role it played in obtaining the federal district court orders it now characterizes as coercive.

federal law preempts state law. *English v. General Electric*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65, 74 (1990). State law is preempted when Congress has explicitly defined the extent to which its enactment preempts state law. 496 U.S. at 78, 110 S.Ct. at 2275, 110 L.Ed.2d at 74. When there is no explicit statement of preemption, state law which seeks to regulate conduct in a field that Congress intended the federal government to occupy exclusively is preempted. *Id.* at 79, 110 S.Ct. at 2275, 65 L.Ed.2d at 74. State law is also preempted to the extent that it actually conflicts with federal law, *id.; Maryland v. Louisiana,* 451 U.S. 725, 747, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576, 596 (1981), as "when compliance with both federal and state regulations is a physical impossibility". *Harrison v. Schwartz,* 319 Md. 360, 364, 572 A.2d 528, 530, *cert. denied,* 498 U.S. 851, 111 S.Ct. 143, 112 L.Ed.2d 110 (1990); *Becker v. Litty,* 318 Md. 76, 86, 566 A.2d 1101, 1106 (1989); *Bd. of Trustees v. Mayor & City Council of Baltimore City,* 317 Md. 72, 115, 562 A.2d 720, 741 (1989), *cert. denied sub nom., Lubman v. Mayor & City Council of Baltimore City,* 493 U.S. 1093, 110 S.Ct. 1167, 107 L.Ed.2d 1069 (1990); *Hecht Co. v. C & P Telephone Co.,* 310 *Md.* 148, 152, 528 A.2d 474, 476 (1987), quoting *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714, 721 (1985).

WSSC posits that the district court orders requiring it to build and operate a composting facility on Site 2, conflicted with, and, therefore, preempted, Maryland's rule of strict liability in nuisance. Relying on the second and third bases for preemption, it makes two arguments: (1) that the emergency federal court orders issued pursuant to the Water Pollution Control Act, under the unique circumstances of this case, effect the preemption and (2) that Maryland law is preempted because it was impossible for WSSC to comply with both the federal court orders and Maryland law.

1.

Underlying WSSC's first argument is the premise that the savings clause, § 1365(e)[9] applies only to citizens' suits. WSSC argues that § 1365(e) has no applicability, broadly, to the Water Pollution Control Act and, in particular, to court orders issued pursuant to § 1364.[10] Because the district court orders were issued pursuant to the emergency powers, to which the savings clause is

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[9] 33 U.S.C. § 1365(e) provides:

> (e) *Statutory or common law rights not restricted.* Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

[10] Section 1364 provides:

> (a) *Emergency Powers.* Notwithstanding any other provision of this Act, the Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons, such as inability to market shellfish, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.

The respondents assert that the record is not at all clear that the suit, pursuant to which the district court orders at issue were passed, was brought under § 1364. They correctly point out that there is nothing in the record to indicate that the administrator brought the action. On the other hand, the July 10, 1978 order states that it was issued "on the basis of the existence of an emergency affecting the health and safety of the residents of the Washington metropolitan area." Moreover, it is clear that the United States filed the complaint alleging the failure of, *inter alia*, WSSC and Montgomery County to devise a permanent sludge management plan, which failure resulted in increased discharges into the Potomac River in violation of the Federal Water Pollution Control Act. *United States v. District of Columbia*, 654 F.2d at 804.

inapplicable, WSSC asserts, the Maryland nuisance standard is not saved, but is preempted. It advises us that this result is mandated by *International Paper Company v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987).

Even if we assume, *arguendo*,[11] that federal district court orders can trigger preemption, no such preemption occurred in this case. In *Ouellette*, Vermont property owners sued, in a Vermont state court, the operator of a New York pulp and paper mill for nuisance. The property owners alleged that pollutants discharged by the New York mill made the water in Vermont "foul, unhealthy, smelly, and unfit for recreational use," and, thus, constituted a "continuing nuisance." The action having been removed to federal district court, the mill operator moved for summary judgment, arguing that the Clean Water Act (the Water Pollution Control Act), preempted the state law suit. *Id.* at 484, 107 S.Ct. at 807, 93 L.Ed.2d at 892. The district court denied the motion, finding that the Act's savings clause preserved actions to redress interstate water pollution under the law of the state in which the injury occurred. 602 F.Supp. 264 (D.Vt.1985). The Court of Appeals for the Second Circuit affirmed. 776 F.2d 55 (2d Cir.1985).

After analyzing the Act's regulatory framework and legislative history, the Supreme Court rejected the argument that the savings clause preserved a state's right to regulate its waters and an injured party's right to seek relief under any statute or the common law of the state

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[11] We observe, as the respondents argue, that the preemption doctrine operates in the context of the United States Constitution and the *laws* of the United States. Thus, when the Constitution of the United States is not involved, it is the laws enacted by Congress in an attempt to carry out congressional intent, to which the doctrine relates. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664, 674-75 (1982).

in which the injury occurred. 479 U.S. at 492, 107 S.Ct. at 811-12, 93 L.Ed.2d at 896-97. It held that the Act precludes a court from applying the law of an affected State against an out-of-state source. *Id.* at 493-94, 107 S.Ct. at 812, 93 L.Ed.2d at 898. *See also Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 477, 104 S.Ct. 2518, 2527, 81 L.Ed.2d 399, 411 (1984). If it were otherwise—if affected states were allowed to impose separate discharge standards on a single point source—the Court explained, serious interference with the achievement of the "full purposes and objectives of Congress" would result:

> If a New York source were liable for violations of Vermont law, that law could effectively override both the permit requirements and the policy choices made by the source State. The affected State's nuisance laws would subject the point source to the threat of legal and equitable penalties if the permit standards were less stringent than those imposed by the affected State. Such penalties would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA, even though the affected State had not engaged in the same weighing of the costs and benefits.

479 U.S. at 495, 107 S.Ct. at 813, 93 L.Ed.2d at 899.

The property owners were not without a remedy, the Court pointed out, because, even though Congress intended to dominate the field of pollution regulation, the savings clause negates the inference that Congress "left no room" for the state causes of action. *Id.* at 492, 107 S.Ct. at 812, 93 L.Ed.2d at 897. Indeed, it noted "[t]he savings clause specifically preserves other state actions, and . . . nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of

the *source* State." *Id.* at 497, 107 S.Ct. at 814, 93 L.Ed.2d at 900. The Court explained:

> An action brought against IPC under New York nuisance law would not frustrate the goals of the CWA as would a suit governed by the Vermont law. First, application of the source State's law does not disturb the balance among federal, source-state, and affected-state interests. Because the Act specifically allows source States to impose stricter standards, the imposition of source-state law does not disrupt the regulatory partnership established by the permit system. Second, the restriction of suits to those brought under source-state nuisance law prevents a source from being subject to an indeterminate number of potential regulations. Although New York nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable. Moreover, States can be expected to take into account their own nuisance laws in setting permit requirements.

Id. at 498-99, 107 S.Ct. at 815, 93 L.Ed.2d at 900-01 (footnotes omitted).

In the course of discussing the effect of the savings clause on suits brought under the laws of the affected state, the Supreme Court observed:

> Section 505(e) [the savings clause] merely says that "[n]othing *in this section*," *i.e.*, the citizen-suit provisions, shall affect an injured party's right to seek relief under state law; it does not purport to preclude pre-emption of state law by other provisions of the Act.

Id. at 493, 107 S.Ct. at 812, 93 L.Ed.2d at 897. Focusing on these comments, surmising that the district court

orders in this case were issued under § 1364, and stressing that the first sentence of § 1365(e) refers only to that section, WSSC argues that "the 'savings clause' is inapplicable to actions under § 1364." It concludes that the federal orders in this case preempted the strict liability standard for nuisance because it "conflicts with, 'stands as an obstacle to' or 'interferes with the methods' for reaching federal environmental goals." Petitioner's brief at 22, quoting *Ouellette*, 479 U.S. at 494, 107 S.Ct. at 813, 93 L.Ed.2d at 898.

As we have seen, the Supreme Court held that the savings clause did preserve other state law remedies when those remedies were sought pursuant to the law of the source state. *Ouellette* simply does not stand for the proposition that all actions under the Clean Water Act, except the citizens' suit section, preempt state law. WSSC reads the savings clause much too narrowly. To the extent that the action does not otherwise thwart the goal of the Clean Water Act, the savings clause does preserve state law remedies. Notwithstanding its inclusion within § 1365, the effect of the savings clause is not limited to that section; it is, rather, a recognition that, in addition to actions under the Clean Water Act, persons injured by pollution may seek additional remedies. The mere inclusion in the same section, of a statute both a specific remedy and a savings clause does not limit the injured person to the specified remedy only.

2.

The next argument that WSSC makes is that the strict liability feature of Maryland's nuisance law made it impossible, for WSSC to carry out the federal court orders and comply with State law at the same time. Compliance with both, it maintains, is a physical impossibility. It offers as the best evidence that this is so, the district court's June 27, 1980 order and the opinion of the United States Court of Appeals affirming those orders. *See generally United States v. District of Columbia*, 654 F.2d 802 (D.C.Cir.), *cert. denied sub nom., Prince George's*

County v. United States, 454 U.S. 1082, 102 S.Ct. 637, 70 L.Ed.2d 616 (1981). WSSC points out that the June 27, 1980 order required various parties to withdraw their complaints, one of which sought a declaration that it was a prospective nuisance, against the Site 2 project in Maryland State courts.

The federal court orders, of course, did not expressly prohibit the filing and maintenance of nuisance actions with respect to operation of Site 2, against WSSC in a Maryland court. It is true, however, that, for there to be preemption, the conflict between State and federal laws which makes compliance with both "a physical impossibility," need not be direct; it may be indirect. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 155-56, 102 S.Ct. 3014, 3023-24, 73 L.Ed.2d 664, 676-77 (1982). Nevertheless, the Court of Special Appeals correctly determined that there was no conflict. It quite properly observed, in that regard, that "the federal district court ordered WSSC to build and operate a composting site in the MIP. It did not, however, order Appellee to build and operate a composting site that emits obnoxious odors that invade the property of others." *CAE-Link*, 90 Md.App. at 615, 602 A.2d at 244.

When the federal district court orders were passed, the issue before the court was the development of the composting plant, *i.e.*, its compliance with the Clean Water Act and the comprehensive program submitted by the parties. The issue was not how the composting plant was to be constructed or whether, as constructed, it would have a nuisance impact on the surrounding community. Different considerations underlie these very different issues. An order that seeks to contain challenges and to have them litigated in a single forum does not, contrary to WSSC's argument, have ramifications for federal preemption of a state nuisance action. The district court relied on the public interest in seeing that all challenges and objections to the sludge disposal plant be expedi-

tiously and consistently resolved as the basis for requiring that all adjudications of that issue occur in that court.

Moreover, in order to build the compositing facility, the petitioner had to condemn 115 acres of land and extinguish the restrictive covenants benefitting that land. That was a cost of the facility. The elimination of odors, or compensating those affected, is likewise a cost of the facility if the plant emits the odors. The Court of Special Appeals put it thusly,

> If the users within the entire area serviced by [the petitioner] through the operation of Site II, are going to inflict the odors generated by the treatment of their sludge on a limited number of Site II neighbors, we see no reason why they should not be required to alleviate that damage or compensate those they damage.

90 Md.App. at 617, 602 A.2d at 245. *See also Fifth Baptist Church*, 108 U.S. at 332, 2 S.Ct. at 729, 27 L.Ed. at 744.

B.

WSSC argues that, even if the strict liability standard in nuisance is not preempted by the emergency orders of the district court, principles of comity and sound judicial policy require that it not be applied in this case. Noting that by enacting the Federal Water Pollution Control Act and vesting primary responsibility and control over its implementation in a federal agency, *see Cleveland Electric Illuminating Co. v. Envtl. Protection Agency*, 603 F.2d 1, 5 (6th Cir.1979), Congress expressed a paramount interest in the restoration of the navigable waters of the nation, and that the district court gave it no choice but to develop the Site 2 project, it urges us, by application of comity, to refrain from applying the strict liability in assessing whether it should be held liable for nuisance. It asks that, instead, we adopt a different standard, applicable only to this case. We decline to do so.

Under the doctrine of comity, courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and respect. *Galloway v. Watts*, 395 F.Supp. 729, 731 (D.Md.1975). That doctrine is a part of our common law. *Holloway v. Safe Deposit & Trust Co.*, 151 Md. 321, 334, 134 A. 497, 501 (1926).

We are not being asked to defer to the federal law of nuisance. We are simply being asked to refrain from applying this State's law, not because it is inapplicable, but because, in WSSC's opinion, when applied in the context of the federal orders in this case, it may have a harsh result. None of the cases WSSC cites, *see Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 102-03, 108-12, 102 S.Ct. 177, 179, 181-84, 70 L.Ed.2d 271, 275, 278-281 (1981); *Mitcheson v. Harris*, 955 F.2d 235, 239-40 (4th Cir.1992); *Cox Cable Hampton Roads v. City of Norfolk*, 739 F.Supp. 1074, 1076-77 (E.D.Va.1990) (refusal of federal courts to exercise jurisdiction over matters of state law more appropriately handled by the state courts) requires, nor are we persuaded by WSSC's arguments, that we should do so.

C.

Relying on the Restatement (2nd) of Torts § 822,[12] WSSC argues that liability for private nuisance should apply only when the interferences with the private use

[12] The Restatement (Second) of Torts § 822 provides:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

and enjoyment of property are intentional and unreasonable or caused by negligence, or reckless, or abnormally dangerous conduct. It urges, therefore, that we reject the strict liability standard and join the jurisdictions which have adopted the Restatement's formulation.[13] Aside from the fact that other courts have adopted the Restatement, WSSC provides no reasoned basis for our discarding the strict liability standard which has a pedigree of long standing in this state. *See e.g. Adams v. Michael*, 38 Md. 123, 126 (1873); *Scott v. Bay*, 3 Md. 437, 444 (1853). For that reason alone, we refuse WSSC's invitation.[14]

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[13] *Nissan Motor Corp. v. Maryland Shipbuilding & Drydock Co.*, 544 F.Supp. 1104 (D.Md. 1982), *aff'd*, 742 F.2d 1449 (4th Cir. 1984); *District of Columbia v. Fowler*, 497 A.2d 456 (D.C.Cir. 1985); *Rumbough v. Tampa*, 403 So.2d 1139 (Fla.App. 1981); *Richmond Bros. Inc. v. Hagemann*, 359 Mass. 265, 268 N.E.2d 680 (1971); *Maerz v. United States Steel Corp.*, 116 Mich.App. 710, 323 N.W. 524 (1982); *Rebel v. Big Tarkio Drainage Dist.*, 602 S.W.2d 787 (Mo.App. 1980); *Hall v. Phillips*, 231 Neb. 269, 436 N.W.2d 139 (1989); *Burke v. Briggs*, 239 N.J.Super. 269, 571 A.2d 296 (1990); *Copart Ind. v. Consolidated Edison Co.*, 41 N.Y.2d 564, 394 N.Y.S.2d 169, 362 N.E.2d 968 (1977); *Waschak v. Moffat*, 379 Pa. 441, 109 A.2d 310 (1954).

[14] While acknowledging that this Court has not explicitly rejected strict liability as a standard for the proof of nuisance, WSSC suggests that we may have done so implicitly. It refers to *Kelley v. R.G. Industries, Inc.*, 304 Md. 124, 132-33, 497 A.2d 1143, 1146-47 (1985); *Yommer v. McKenzie*, 255 Md. 220, 225-226, 257 A.2d 138, 139 (1969), cases adopting the Restatement (Second) of Torts, §§ 519 and 520, relating to "Abnormally dangerous activities." Nothing in these opinions make that suggestion. Abnormally dangerous activities or conditions are not the only types of nuisances recognized in this state. Nuisance is usually placed into three classifications:

> First, those which are nuisance per se or by statute; second, those which prejudice public health or comfort such as slaughterhouses, livery stables, etc.; third, those which in their nature are not nuisances, but may become so by reason of their locality, surroundings, or the manner in which they may be maintained.

Burley v. Mayor, Counsellor and Alderman of City of Annapolis, 182 Md. 307, 312, 34 A.2d 603, 605 (1943) (quoting 2 *Dillon on*

Moreover, it is not the unanimous verdict of other jurisdictions that the Restatement should be adopted and the strict liability standard for nuisance discarded. *See Graber v. Peoria*, 156 Ariz. 553, 753 P.2d 1209, 1211 (Ariz.Ct. App.1988) (whether an interference is unreasonable is determined by the injury caused by the condition and not by the conduct of the party creating the condition); *Turner v. Thompson*, 102 Ill.App.3d 838, 58 Ill.Dec. 215, 219, 430 N.E.2d 157, 161 (1981) (Negligence is not involved in an action with respect to nuisance); *Page County Appliance Center, Inc. v. Honeywell, Inc.*, 347 N.W.2d 171, 175 (Iowa 1984) (The existence of a nuisance is not affected by the intent of its creator not to injure anyone); *State v. Lloyd A. Fry Roofing Stevenson*, 310 Minn. 535, 246 N.W.2d 692, 695 (1976) (Negligence and nuisance are distinct concepts and the defendant's negligence or failure to act reasonably is not an essential element in a nuisance action); *Frank v. Envtl. Sanitation Mgmt. Inc.*, 687 S.W.2d 876, 880 (Mo. 1985) (Nuisance is a condition and does not depend on the degree of care used).

III.

In addition to the failure to produce evidence of negligence in constructing and operating the composting facility, the trial judge ruled, alternatively:

> The second basis upon which I grant the motion on the nuisance, is that the law is set forth not only in [*Maryland Port Administration v.*] *QC* [*Corp.*, 310 Md. 379, 529 A.2d 829 (1987)], but language in *Electro-Nucleonics* [, *Inc. v. WSSC*, 315 Md. 361, 554 A.2d 804, *cert. denied*, 493 U.S. 854, 110 S.Ct.

Municipal Corporations, 1044-45 (5th ed.). Sewage composting facilities, like slaughterhouses or livery stables, prejudice public comfort. We have stated "[i]t is not necessary that a public nuisance should be injurious to health; if there be smells offensive to the senses, that is enough. . . ." *Woodyear v. Schaefer*, 57 Md. 1, 12 (1881) (quoting *Rex v. Neil*, 2 C. & P 185).

> 158, 107 L.Ed.2d 115 (1989)] in that the court can find no substantial diminution in the use of any of these properties by any of the Plaintiffs as the result of the odor.

The Court of Special Appeals held that ruling was error. It reasoned that neither *QC*, nor *Electro-Nucleonics*, addressed the standard of proof applicable to nuisance;[15] rather, both dealt with the standard required to prove a non-possessory taking. 90 Md.App., at 619, 602 A.2d at 246. On this point, the intermediate appellate court is clearly correct.

In *QC*, the issue was "whether, by operating a hazardous waste disposal facility on its own land, the State of Maryland has taken adjacent leasehold property of the plaintiff." 310 Md. at 381, 529 A.2d at 829. In *Electro-Nucleonics*, in addition to that raised in *QC*, the issue was whether "property of the appellant in the form of the benefit of certain restrictive covenants which had burdened the condemned property" had been taken. 315 Md. at 363, 554 A.2d at 805.

While not disputing that *QC* and *Electro-Nucleonics* did not involve nuisance, WSSC maintains that the trial court applied the correct standard to assess the sufficiency of the evidence of nuisance to create a jury question. It asserts that neither respondent presented "sufficient evidence from which the jury could find that the value of each Responudent's property was diminished *materially* as a result of odors from Site II *and* that those odors

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[15] A nuisance count was pled in *Maryland Port Admin. v. QC Corp.*, 310 Md. 379, 385, 529 A.2d 829, 831 (1987); however, it was dismissed for failure to give the State notice, a ruling not challenged on appeal. In part III of the opinion, the Court considered "the taking claim from a nuisance point of view." *Id.* at 391 n. 9, 529 A.2d at 834 n. 9. By that, we meant that we would consider whether in that case a taking had occurred, as it could have, "without a physical invasion of the property allegedly taken." *Id.* at 399-402, 529 A.2d at 838-840.

seriously interfered with each Respondent's use of its property." Petitioner's brief at 36.

Not every interference with the use or enjoyment of land constitutes an actionable nuisance. *Adams v. Michael,* 38 Md. 123, 126 (1873). To be actionable, "[t]he injury must be of such a character as to diminish materially the value of the property as a dwelling [or for the purpose] and seriously interfere with the ordinary comfort and enjoyment of it." (citations omitted). *Slaird v. Klewers,* 260 Md. 2, 9, 271 A.2d 345, 348 (1970). *See Stottlemyer v. Crampton,* 235 Md. 138, 143-44, 200 A.2d 644, 646 (1964); *Bishop Processing Company v. Davis,* 213 Md. 465, 472-474, 132 A.2d 445, 449 (1957); *Gorman v. Sabo,* 210 Md. 155, 162-64, 122 A.2d 475, 478 (1956); *Five Oaks Corp. v. Gathmann,* 190 Md. 348, 352, 353, 58 A.2d 656, 658 (1948); *Meadowbrook Swimming Club,* 173 Md. 641, 645, 197 A. 146, 148 (1938). This standard is best understood by reference to its application in specific cases.

Bishop's Processing Company involved a suit perpetually to enjoin the operator of a processing plant from maintaining and operating the plant so that the odors emanating from the plant interfered with the rightful use and enjoyment by the plaintiffs of their properties in the area. The evidence showed that the plaintiffs resided between one-half to one mile of the plant and that

> the process used by the Company in manufacturing its products, when not curbed, produces a shocking and nauseating stench and odor which permeates the surrounding atmosphere for more than a mile and that the stench is so bad that even though the doors and windows of the homes of persons living in the neighborhood surrounding the plant are closed, it comes into the homes causing throat irritations, severe headaches, loss of appetite, nausea, regurgitation and in other ways interferes with the

> comfortable enjoyment of their homes by the appellees in this proceedings. The appellees complained particularly of terrific, indescribable unwholesome effluvia that came from the plant and which varied only with the change of the direction of the wind, and stated that while there was relief when the wind blew the odor away from a particular location it was continuous during the operation of the plant in that it followed the wind and caused discomfort in another location in the direction from the plant in which the wind was blowing.

213 Md. at 470, 132 A.2d at 447. The Court rejected the argument that the evidence was insufficient to establish that, had they sued at law, the plaintiffs would have been entitled to substantial damages. Applying the test set out above, it held that the plaintiffs had shown sufficient discomfort and injury to their properties to entitle them to injunctive relief. The Court said:

> [T]he evidence justifies a finding that the odors complained of caused physical discomfort and annoyance to those of ordinary taste, sensibilities and habits; and that the injury to the appellees' properties was of such a character as to diminish materially their value as dwellings, and to interfere seriously with the ordinary comfort and enjoyment thereof. This clearly brings the appellees within the above quoted and cited decisions of this Court so as to be entitled to relief.

213 Md. at 474, 132 A.2d at 449. One of the cases to which the Court referred was *Meadowbrook Swimming Club*. In that case, we said that,

> where a trade or business as carried on interferes with the reasonable and comfortable enjoyment by another of his property, a wrong is done to a neighboring owner for which an action lies at law or equity. In such cases it makes no difference that the

> business was lawful and useful to the public and conducted in the most approved method.

173 Md. at 645, 197 A. at 148 (citations omitted).

> The allegation in *Gorman* was that the Gormans "embarked upon an intentional malicious and willful course of action to annoy, harass and injure the plaintiffs by causing, permitting, or causing and permitting loud and offensive sounds to emanate from their said property in such a way as to pass over into the plaintiffs' property resulting in serious interference with the ordinary comfort, use and enjoyment by the plaintiffs of their property, and persisted and still persist in continuance of the said course of action after frequent requests to desist."

210 Md. at 158-59, 122 A.2d at 476. We held that:

> If noise causes physical discomfort and annoyance of persons of ordinary sensibilities, tastes, and habits and seriously interferes with the ordinary comfort and enjoyment of their homes, and thus diminishes the value of the use of their property rights, it constitutes a private nuisance, entitling those offended against to damages.

Id. at 159, 122 A.2d at 476 (citations omitted). We went on to quote Prosser, *Law & Torts,* 406, 407 (2d ed.) for the proposition that noise that disturbs the comfort or convenience of the occupant of property is a nuisance and, "[s]o long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance." *Id.* Moreover, we said,

> Where there is a non-trespassory invasion rights in real property occupied by the owner as a home, consisting of a temporary private nuisance, the measure of damages is the diminution in the value of the

> use of the property as a home. The elements to be considered in the loss of the value of the use include the ordinary use and enjoyment of the home, and may also include sickness or ill health of those in the home caused by the nuisance.

210 Md. at 162, 122 A.2d at 478. Among the authorities cited for that proposition was *Baltimore & PR Co. v. Fifth Baptist Church,* 108 U.S. 317, 2 S.Ct. 719, 27 L.Ed 739 (1883). In that case, as we have seen, the Supreme Court said:

> The plaintiff was entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, thus necessarily tending to destroy the use of the building for the purposes for which it was erected and dedicated. The property might not be depreciated in its salable or market value. . . . But, as the court below very properly said to the jury, the congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages.

Id. at 335, 2 S.Ct. at 731, 27 L.Ed. at 745-46. *See also Beahm v. Shortall,* 279 Md. 321, 341-42, 368 A.2d 1005, 1017 (1977); *Carr's Beach Amusement Co. v. Annapolis Roads,* 222 Md. 392, 396, 160 A.2d 598, 600 (1960); *Mass Transit Admin. v. Miller,* 271 Md. 256, 259, 315 A.2d 772, 774 (1974); *Meadowbrook Swimming Club,* 173 Md. at 644-47, 197 A. at 148.

The Court of Special Appeals referred to the evidence presented by the respondents to prove that WSSC's operation of Site 2 interfered with their use and enjoyment of their property. *See* 90 Md. App. at 618, 602 A.2d at 245. From that testimony, the jury could have found that the odors emanating from WSSC's plant produced "actual

physical discomfort to persons of ordinary sensibilities, tastes, and habits," thereby diminishing materially the value of the property as a commercial establishment and seriously interfering with their ordinary comfort and enjoyment.

IV.

The trial judge admitted into evidence, as proof of damages on the inverse condemnation count, three real estate appraisals prepared at the request of AT & T and two appraisals made at the request of Computer Entry Systems (now BancTec Systems, Inc.). These appraisals showed that, rather than decreasing in value, the AT & T and BancTec properties had actually increased in value since the composting facility was built. When the admissibility of these reports was raised, AT & T, BancTec and CAE-Link [16] expressly objected. Holding that they were business records, the trial court overruled the objections and admitted the reports pursuant to Maryland Code (1989) § 10-101 of the Courts and Judicial Proceedings Article. The respondents argued, both in the trial court and before the Court of Special Appeals, that the records were inadmissible for lack of authentication and because they are hearsay. The Court of Special Appeals held that the trial court committed clear error, and reversed.

WSSC's challenge to this portion of the Court of Special Appeals' opinion is threefold. First, noting that the court held that BancTec, AT & T, and CAE-Link lacked standing to maintain an inverse condemnation action against it, which was rendered final when we denied their petition for certiorari and, therefore, can no longer enjoy the benefits of a reversal on that issue, it asserts that the other respondents waived the issue when they failed to object to the admissibility of the reports.

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[16] WSSC does not definitively concede that CAE-Link objected; it does, however, acknowledge that it is arguable that it did.

Second WSSC argues that, assuming the erroneous admission of the appraisals, only AT & T and BancTec were prejudiced; it was harmless and non prejudicial as to the other respondents. Finally, WSSC contends that the reports were properly admitted into evidence.

As to the preservation argument, the respondents correctly point out that during pretrial diccussions, when an attorney for one of the parties [17] attempted to insure that objections previously made were preserved as to his or her client, the court indicated that "they [objections] apply to all plaintiffs, is that right? That is understood." An attorney then said, "An objection for one is an objection for all plaintiffs." No one stated a contrary position and the record does not reflect that, at any time thereafter, the ground rules were changed. Accordingly, despite no explicit objection having been made by any of the respondents whose inverse condemnation claim survives, the issue was not thereby waived. *See Mejia v. State*, 328 Md. 522, 539, 616 A.2d 356, 364 (1992).

Nor was the error harmless. No limiting instruction was given. While the reports purported to relate only to AT & T's and BancTec's property, the appraisals themselves contained comments and opinions about the neighborhood in which the AT & T and BancTec property was located. One of the AT & T's appraisals titled "Neighborhood Analysis" stated,

> [T]he subject neighborhood will likely experience an increased rate of growth regarding high tech development and should continue to enjoy expansion in the residential sector. New office development is becoming more preponderant in this neighborhood and tends to increase the overall quality of the type

[17] The attorney did not identify himself nor his client, as required. In fact, the transcript reflects that the rule the court imposed, that counsel should identify themselves when speaking, was more honored in the breach.

> of properties. This new development should tend to enhance land values in the area and promote future marketability of properties in this neighborhood.

Similarly, the section of BancTec's appraisal titled "Neighborhoood Data" described the area thusly, "Real estate values in the subject neighborhood have continued to increase over the past several years because of the excellent location with respect to the Washington Metropolitan Area." The jury could have inferred from that that the property of the other respondents also increased in value.

In holding the appraisals inadmissible, the Court of Special Appeals noted, that the appraisals, rather than being required by law, on the day-to-day functions of the business, the appraisals were requested by AT & T and BancTec, and that the appraisals had no effect on the operation of those businesses. 90 Md.App. at 623-24, 602 A.2d at 248. The court concluded, therefore, that the appraisals do not qualify as business records. *Id.* We agree.

V.

On the issue of damages for inverse condemnation; the trial judge instructed the jury on the issues of damages, as follows:

> [t]he measure of damages, if any, to Plaintiffs for the loss of their right to enforce the restrictive covenants against the Washington Suburban Sanita[ry] Commission, shall be determined by comparing the fair market value of each of the Plaintiffs' property immediately prior to the July 8, 1980 extinguishment of the restrictive convenants, which the fair market value of each Plaintiffs' properties immediately after July 8, 1980.
>
> Any difference that you may find between those values should be the measure of damages available to each Plaintiff in this proceeding.

* * * *

> In the determination of any changes of value of the Plaintiff's [sic], you may consider whether there was substantial interference with the use and enjoyment of the property by Plaintiff's [sic] resulting from extinguishment of the covenants.

WSSC maintains that the trial judge correctly instructed the jury concerning the valuation of the respondents' property. Relying on Maryland Code (1988) § 12-104(b) of the Real Property Article, it asserts that consequential damages may be awarded for a partial taking, which may be proven by evidence of specific problems the taking and future public use caused.

The respondents argue, on the other hand, that the instruction erroneously suggested that they had to prove, in addition to measurable value, that the extinguishment of the covenants would "substantially interfere" with the use and enjoyment of their properties. That is not, they posit, the proper test for determining the extent to which restrictive covenants add measurable value to a property.

Section 12-104(b) provides:

> The damages to be awarded where land, or any part of it, is taken is the fair market value of the part taken, but not less than the actual value of the part taken plus any severance or resulting damages to the remaining land by reason of the taking and of future use by the plaintiff of the part taken. The severance or resulting damages shall be diminished to the extent of the value of the special (particular) benefits to the remainder arising from the plaintiff's future use of the part taken.

In *Brannon v. State Road Comm'n*, 305 Md. 793, 506 A.2d 634 (1986), we noted that damages for a partial taking may be assessed in two ways: the measure of damages prescribed by § 12-104(b), *i.e.*, "the actual value of the part taken plus any severance or resulting damages to the remaining land by reason of the taking and of future

use by the plaintiff of the part taken." 305 Md. at 799, 506 A.2d at 637, (footnote omitted) and "the difference between the fair market value of the entire tract before the taking and the fair market value of what is left thereafter." *Id.* (quoting *Big Pool v. State Roads Comm'n,* 245 Md. 108, 113, 225 A.2d 283, 285 (1967) (citing *Mayor and City Council of Baltimore v. State Roads Comm'n,* 232 Md. 145, 152, 192 A.2d 271, 279 (1963)). *See also Oxon Hill Rec. Club, Inc. v. Prince George's County,* 281 Md. 105, 107-08, 375 A.2d 564, 566 (1977); *Bd. of Educ. v. Hughes,* 271 Md. 335, 345, 317 A.2d 485, 490 (1974); *State Roads Comm'n v. Hance,* 242 Md. 137, 139, 218 A.2d 33, 35 (1966). We pointed out that these different methods have the same goal: putting the landowner in as good a pecuniary position as if no taking had occurred. 305 Md. at 799, 506 A.2d at 637-38, citing *Dodson v. Anne Arundel County,* 294 Md. 490, 494, 451 A.2d 317, 320 (1982). They are not, however, cumulative. "The landowner may choose to offer direct evidence, in the form of expert testimony . . . [o]r, the landowner may choose to offer no direct evidence of consequential damages and, instead, offer evidence pertaining to the before-taking and after-taking value of the property." *Id.* [305 Md.] at 801, 506 A.2d at 639. The first two paragraphs contained a proper instruction on the before/after valuation method, consistent with the respondents' theory. The court should have stopped there. By going further and addressing whether there was substantial interference with the use and enjoyment of the property, it attempted to employ the statutory method of assessing damages as well. Because only one method may be utilized, and, in this case, was sought to be used, the court erred.

JUDGMENT AFFIRMED, WITH COSTS.

APPENDIX B

COURT OF SPECIAL APPEALS OF MARYLAND

No. 849, Sept. Term, 1991

CAE-LINK CORPORATION, *et al.*

v.

WASHINGTON SUBURBAN SANITARY COMMISSION

March 2, 1992

David H. Bamberger, Baltimore, and John E. Prominski, Jr., Fairfax, Va. (Joanne L. Cronrath and Piper and Marbury, Baltimore, on the brief), for appellants.

Richard J. Magid and William F. Ryan (Whiteford, Taylor & Preston on the brief, Baltimore, of counsel: Nathan J. Greenbaum, Gen. Counsel, and Robert H. Drummer, Associate Gen. Counsel for WSSC on the brief), Hyattsvill, for appellee.

Argued before GARRITY, BLOOM and CATHELL, JJ.

CATHELL, Judge.

The Washington Suburban Sannitary Commission (WSSC) commenced this declaratory judgment action eleven years ago against various specified property owners in the Montgomery Industrial Park (MIP),[1] as well as

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[1] On motions prior to and during trial, WSSC asked the court to dismiss the inverse condemnation claims of those Appellants who

other persons claiming injury as a result of WSSC's taking of certain covenants running with the land. The MIP owners who are present parties to the case are CAE-Link Corporation, BancTec Systems, Inc., AT & T Resource Management Corporation, International Fabricare Institute, Erie Indemnity Company and the Washington Post Company. Additionally, John and Norma Robertson and Jerry and Barbara Robertson are also appellants. All of the appellants are represented by the same attorneys on appeal and all issues and arguments here raised by counsel are made on behalf of all appellants. Except when otherwise necessary, we shall refer to all of the owners as appellants.

On July 10, 1978, the United States District Court for the District of Columbia issued a comprehensive order, pursuant to the Federal Water Pollution Control Act, which required WSSC to build and have operational by July 1, 1979, a sewage sludge composting facility in Montgomery County, Maryland.[2]

On April 25, 1980, the district court issued a second order compelling WSSC to move forward with the construction and operation of a sewage sludge composting

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took title to their land in the MIP after WSSC's July 8, 1980, condemnation date. Computer Entry Systems Corp. (now known as BancTec Systems, Inc.), Singer Company (now known as CAE-Link Corporation) and AT & T took title to their land after that date. The trial court denied WSSC's motions for judgment as to these "subsequent takers" and permitted the jury to consider inverse condemnation claims based on covenant rights which were extinguished on July 8, 1980.

[2] This order was the result of a suit by the United States to rectify an environmental crisis caused by the inadequate methods of disposal of sewage sludge generated by the Blue Plains Sewage Treatment Plant. Because the Blue Plains Plant provided sewage treatment for several Washington Metropolitan jurisdictions, including Montgomery and Prince George's counties, WSSC, as the bi-county commission of the State of Maryland responsible for the water and sewage service for both counties, was named as a defendant in that suit.

facility to be located at the specified site in the MIP, known as "Site II." On June 27, the district court issued a third order reiterating the directives set forth in its prior orders. In this order, the district court overrode and enjoined WSSC from complying with an injunction issued by the Circuit Court for Prince George's County which prohibited WSSC from expending any funds to build or operate Site II. The federal judge also ordered WSSC to proceed expeditiously to obtain the land, build, and operate the composting project. Finally, the judge enjoined all parties from taking any action which would frustrate or impede the execution of the order.

Pursuant to the district court's order, WSSC filed a condemnation action in the Circuit Court for Montgomery County to obtain the land for the Site II composting project. WSSC condemned 115 acres in the MIP for the construction and operation of a sewage sludge composting facility. The land WSSC took by condemnation was burdened by certain restrictive covenants in favor of neighboring land owners in the MIP. Thus, WSSC initiated a declaratory judgment action to determine whether the beneficiaries of the covenants had to be compensated for the value of those property rights. The defendants answered WSSC's complaint and filed counterclaims for monetary damages alleging inverse condemnation, breach of covenant, nuisance, bad faith pursuant to Maryland Rule 1-341 and violation of 42 U.S.C. section 1983.

On motion of the defendants, the trial court issued a ruling that the restrictive covenants owned by the defendants and extinguished by WSSC's condemnation were compensable property interests and denied WSSC's claim for declaratory relief. WSSC appealed to this Court, which affirmed the lower court's ruling. *WSSC v. Frankel*, 57 Md.App. 419, 470 A.2d 813 (1984). The Court of Appeals subsequently vacated and remanded the case for further proceedings in the circuit court. *WWSC v. Frankel*, 302 Md. 301, 487 A.2d 651 (1985).

WSSC moved for partial summary judgment. The trial court granted WSSC's motion as to the counterclaims that alleged violation of § 1983, bad faith, and punitive damages. The court denied WSSC's motion as to the counterclaims for inverse condemnation and breach of covenants. As the nuisance claim, the court granted partial summary judgment to the extent of requiring that the defendants prove that WSSC was negligent. The counterclaims for breach of covenant were nevertheless dismissed by stipulation of the parties that the covenants had been extinguished in July of 1980 as a result of the WSSC's condemnation of Site II.

Trial by jury on the nuisance and inverse condemnation counts began on March 4, 1991. At the close of the counterclaimants' case-in-chief, WSSC moved for judgment on both counts. The trial court denied WSSC's motion as to inverse condemnation, but granted the motion on the nuisance count. At the conclusion of all the evidence, the jury found in favor of WSSC.[3] Counterclaimants' motion for new trial was denied and this appeal ensued.

On appeal, Appellants present the following assignments of error.

I. The trial court committed reversible error in granting WSCC's Motion For Judgment on Appellants' claims for nuisance.

A. The trial court committed reversible error in ruling that proof of negligence was a prerequisite to recovery on Appellants' nuisance claim.

B. The trial court erred in equating the standard of proof necessary to establish a non-possessory

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[3] The jury did not "find by the preponderance of the evidence that the covenants extinguished on July 8, 1980 added measurable value to the land in the Montgomery Industrial Park owned by" each of the defendants.

taking with the standard of proof necessary to establish a nuisance.

II. The trial court committed reversible error in instructing the jury that in determining the value of the restrictive covenants, they could consider whether WSSC's use of Site 2 substantially interfered with Appellants' use and enjoyment of their lands.

III. The trial court committed reversible error in admitting evidence of unforeseeable "comparable" sales that occurred long after the date of taking.

IV. The trial court committed reversible error in admitting prejudicial evidence that certain Appellants had knowledge when they purchased their lands that WSSC proposed to build a sludge facility.

V. The trial court's erroneous and inconsistent evidentiary rulings created jury confusion and warrant reversal.

A. WSSC's internal memoranda on the issue of the value of the restrictive covenants should have been admitted.

B. The trial court committed reversible error by allowing the jury to visit Site 2 at the close of all the evidence.

C. The trial court's double standard for admissibility of evidence "inside" and "outside" MIP prevented the jury from having an accurate picture of the effect of Site 2 on Appellants' properties.

D. The trial court's admission of hearsay appraisals was erroneous and prejudicial.

E. The trial court erred by admitting WSSC's "state-of-the-art" evidence.

F. The trial court erred in refusing to allow Appellants to cross-examine WSSC's expert fully with regard to his credibility.

Appellee cross appeals, raising three issues:

I. The trial court erred by permitting the jury to consider the inverse condemnation claims of those Appellants who purchased their land after the restrictive covenants were extinguished on July 8, 1980.

II. The trial court erred by refusing to strike the speculative valuation testimony of Appellants' expert witness, E.L. Dieudonne.

III. The trial court erred by refusing to grant WSSC's motion for judgment against AT & T on the ground that its inverse condemnation claim was barred by limitations.

DISCUSSION

I. THE TRIAL COURT ERRED BY GRANTING WSSC'S MOTION FOR JUDGMENT AS TO APPELLANTS' NUISANCE CLAIMS.

In granting judgment in favor of WSSC on the nuisance claims, the trial court said:

> With respect to the nuisance claim, the motion to dismiss is granted for two reasons. The first reason being that right or wrong I have held that in this case, based upon the facts in this case, that in order to recover on a nuisance theory, the Plaintiffs have to show simple negligence in the construction and operation of the facility. There is no evidence that I can recall to support that theory.

Appellee argues that the principal issue on this appeal is whether, as a matter of law, it can be held strictly

liable in nuisance for complying with the injunctive orders of a federal district court which specifically required it to build and operate a sewage sludge composting facility at a specified location near Appellants' properties. Appellee contends that federal law (Federal Water Pollution Control Act) preempts the state law of nuisance and an award of damages would constitute an "attack" on the order of the district court. Appellants rebut Appellee's preemption argument, asserting that an award of damages, unlike injunctive relief, would not interfere with the operation of Site II and that a nuisance cannot be created with impunity pursuant to legislative or judicial authority.

A. PREEMPTION

The Supremacy Clause of the United States Constitution, art. VI, cl. 2, requires that when compliance with both federal and state law is a physical impossibility, the "state law is 'void to the extent it conflicts with a federal statute.' " *Sanders v. State,* 57 Md.App. 156, 167, 469 A.2d 476 *cert. denied,* 299 Md. 656, 474 A.2d 1345 (1984) (quoting *Maryland v. Louisiana,* 451 U.S. 725, 747, 101 S.Ct. 2114, 2169, 68 L.Ed.2d 576 (1981)). *See also Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985); *Harrison v. Schwartz,* 319 Md. 360, 364, 572 A.2d 528, *cert. denied,* —— U.S. ——, 111 S.Ct. 143, 112 L.Ed.2d 110 (1990); *Hecht Co. v. C & P Telephone Co.,* 310 Md. 148, 152, 528 A.2d 474 (1987). If Congress has expressly stated to preemptive intent or evidenced an intent to occupy a field, federal law shall govern. *Harrison,* 319 Md. at 364, 572 A.2d 528. When, however, Congress does not expressly state its intent, there is a presumption against preemption. *Abbott by Abbott v. American Cyanamid Co.,* 844 F.2d 1108, 1112 (4th Cir.1988) (citing *Maryland v. Louisiana,* 451 U.S. at 726, 101 S.Ct. at 2118). The presumption is even stronger against preemption of state remedies,

like tort recoveries, when no federal remedy exists. *Abbott*, 844 F.2d at 1112 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 104 S.Ct. 615, 622, 78 L.Ed. 2d 443 (1984)). *See also Taylor v. Gen. Motors Corp.*, 875 F.2d 816 (11th Cir.), *cert denied*, 494 U.S. 1065, 110 S.Ct. 1781, 108 L.Ed.2d 783 (1991) (strong presumption against preemption when subject matter is tort remedy).

The federal district court passed its order pursuant to 33 U.S.C. § 1251 *et seq.*, the Federal Water Pollution Control Act or the Clean Water Act (1987). Section 1251(a)(5) provides that "it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State. . . ." Section 1365(e), known as "the saving clause," provides that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or *to seek any other relief*. . . ." (Emphasis added.)

The paradigmatic decision in this area is *International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987). In *Outllette*, Vermont landowners brought suit against an operator of a New York pulp and paper mill, under the Vermont common law of nuisance. The Supreme Court held that the Clean Water Act preempted Vermon nuisance law to the extent that that law sought to impose liability on an out-of-state point source [4] because that "would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'" *Ouellette*, 479 U.S. at 493-94, 107 S.Ct. at 812 (citation omitted). The Act did not, however, bar landowners from bringing a nuisance claim pursuant to the

[4] "A 'point source' is defined by the CWA as 'any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.'" 479 U.S. at 485 n. 4, 107 S.Ct. at 808 n. 4.

law of the source state, which in that case was New York. *Id.* at 497-99, 107 S.Ct. at 814-15. The Court stated that "[t]he saving clause specifically preserves other state action, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the *source* State." 479 U.S. at 497, 107 S.Ct. at 814 (emphasis in original). *But see City of Milwaukee v. Illinois,* 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981) (the Water Pollution Control Act saving clause does not bespeak a congressional intent to preserve *federal* common law remedies inconsistent with the complex statutory scheme provided by that Act). *Accord Nat'l Audubon Soc'y v. Dep't of Water,* 869 F.2d 1196 (1988) (*federal* common law nuisance claims are preempted by Federal Water Pollution Control Act).

Appellee relies on the case of *Bieneman v. City of Chicago,* 864 F.2d 463 (7th Cir. 1988), *cert. denied,* 490 U.S. 1080, 109 S.Ct. 2099, 104 L.Ed.2d 661 (1989). This reliance is misplaced. The *Bieneman Court* held that all state common law remedies *were not* preempted. *Id.* at 473. Appellee finds significant the Court's holding that "[a] state court could not award damages against O'Hare or its users for conduct required by these regulations. . . ." *Id.* at 472. In the case *sub judice*, the federal district court ordered WSSC to build and operate a composting site in the MIP. It did not, however, order Appellee to build and operate a composting site that emits obnoxious odors that invade the property of others. Therefore, WSSC's conduct was not entirely directed by the district court order and state actions are not precluded. Thus, because of the saving clause, the Water Pollution Control Act would not bar Appellants from maintaining their nuisance suit in this state nor is the nuisance action otherwise preempted by federal law.

B. NUISANCE CLAIM

Appellants argue that the trial court erred by requiring them to prove negligence as a prerequisite to recovery on their nuisance claim. They specifically argue that in Maryland nuisance is a matter of strict liability and that negligence is not a necessary element; thus, the trial court's ruling directly contradicts established law in this state. Appellees refutes this argument, contending that it should not be held strictly liable for doing what it was ordered to do and cites numerous cases from other jurisdictions that require a showing of negligence in order to establish nuisance. Appellee advises us to carve out an exception based on the unusual facts of this case. We decline.

The Court of Appeals, in *Meadowbrook Swimming Club, Inc. v. Albert,* 173 Md. 641, 645, 197 A. 146 (1938), said:

> The law is clear that where a trade or business as carried on interferes with the reasonable and comfortable enjoyment by another of his property, a wrong is done to a neighboring owner for which an action lies at law or equity. In such cases it makes no difference that the business was lawful and one useful to the public and conducted in the most approved method. [Citations omitted.]

See also Bishop Processing Co. v. Davis, 213 Md. 465, 47, 4, 132 A.2d 445 (1957); *Gorman v. Sabo,* 210 Md. 155, 159, 122 A.2d 475 (1956); *Anne Arundel Fish & Game Conservation Ass'n, Inc. v. Carlucci,* 83 Md.App. 121, 131, 573 A.2d 847, *cert. denied,* 320 Md. 800, 580 A.2d 218 (1990). The Court of Appeals held in *Taylor v. Mayor and City Council of Baltimore,* 130 Md. 133, 99 A. 900 (1917), that the City of Baltimore could be liable for nuisance even though it constructed a sewage treatment plant under the authority of state law. The Court, discussing nuisance, posed the question: "Is it to be said that a municipal corporation can thus interfere

with the rights of others and injure their property without being liable in damages, merely because it, in constructing its work, is acting under legislative authority?" *Taylor*, 130 Md. at 140, 99 A. 900. The Court answered, "The Legislature has no power to grant such rights to any corporation, public or private." *Id.* See also *Richards v. Washington Terminal Co.*, 233 U.S. 546, 556-58, 34 S.Ct. 654, 658, 58 L.Ed. 1088 (1914), where the Supreme Court held that even though a defendant's activity is so important to the public that he is given the power of eminent domain, if it causes an unreasonable invasion of another's property interests, defendant will be liable for damages for the nuisance.

At oral argument, Appellee suggested that even with a "state of the art" facility some obnoxious odors may well be emitted from the site. When suggestions were made that such emisisons might well necessitate the obtaining of sufficient property (or easement rights) by WSSC to contain such odors on site, it was proffered that to do so would be so costly as to be economically unfeasible and/or impossible. Without accepting the logical inconsistency of WSSC's position that, first, it is not maintaining a nuisance and that, second, it would have to purchase so much land to contain the smell that it would be financially impossible, we note that its position assumes that the nuisance burden it creates should be borne only by the Site II neighbors, rather than spread through condemnation costs or damages [5] to all of its users, *i.e.*, the sources of the material creating the odors. WSSC's position is that it can create a nuisance with impunity. It does not acknowledge that it can allot the costs of the damage it creates through-

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[5] Condemnation or purchase of fee simple property *or easement rights* would be a one-time cost whereas damages might be continuing or intermittent into the future. Maryland Annotated Code art. 29, § 1-202(b) (1990), provides that "WSSC may purchase in fee or as an easement property for the construction, extension, or maintenance of a project the WSSC considers necessary to carry out the provisions of this article."

out its user base by additional condemnation financed by charges directly or indirectly assessed against its users, or through damages similarly financed.

If the users within the entire area serviced by WSSC, through the operation of Site II, are going to inflict the odors generated by the treatment of their sludge on a limited number of Site II neighbors, we see no reason why they should not be required to alleviate that damage or compensate those they damage. That, as we see it, can be accomplished by operating an odor-free facility, obtaining sufficient property to contain odors on site, or by the payment of damages.

Appellee, during oral argument, forcefully argued that at the time it built the composting facility they used the "state of the art" technology and, accordingly, should not be held liable. We said in *Little v. Union Trust Co. of Maryland,* 45 Md. App. 178, 412 A.2d 1251 (1980), that "a 'nuisance exists because of a violation of an absolute duty so that it does not rest on the degree of care used. . . ." *Id.* at 185, 412 A.2d 1251 (quoting *Sherwood Bros., Inc. v. Eckard,* 204 Md. 485, 493, 105 A.2d 207 (1954)). *See also Benson v. Loehler,* 228 Md. 55, 60, 178 A.2d 909 (1962); *Edwards v. Chadwick,* 22 Md. App. 140, 155, 321 A.2d 792 (1974). *See generally Sherwood Bros. v. Eckard,* 204 Md. 485, 493, 105 A.2d 207 (1954) (noting distinction between nuisance and negligence); Gilbert, *Maryland Tort Law Handbook* § 18.0 at 185 (1986) (nuisance is distinguished from negligence in that even though a person or corporation complies with all laws, rules and regulations they might nevertheless commit a nuisance).

In the instant case, extensive testimony was presented that WSSC's operation of Site II interfered with the use and enjoyment of Appellants' properties. Several employees from Appellant companies testified that there was a foul odor in the air that could not be detected prior to to operation of the composting facility. Several employees

became nauseated and complained of headaches. These complaints related to odors both inside and outside of the various buildings operated by Appellants.[6] There was also testimony that the smells remained for days and sometimes weeks depending on the weather.

The evidence showed that, on occasion, the vents on some of Appellants' buildings allowing fresh air intake had to be closed and inside air recirculated because of odor. Additionally, when the intakes were open, the intake filters had to be replaced on a weekly rather than a monthly basis, which was more costly. One of the Apellant companies cancelled plans to double the size of its facility in part because of the odor emanating from the composting site.

We believe that the evidence might justify a finding by the trier of fact that the odors complained of are such that they produce "actual physical discomfort to persons of ordinary sensibilities, tastes and habits" thus, entitling the offended to damages. *Bishop Processing Co.*, 213 Md. at 474, 132 A.2d 445; *Meadowbrook Swimming Club,* 173 Md. at 645, 197 A. 146. We hold that the trial court erred when it ruled that negligence was a necessary element of the tort of nuisance. We shall vacate the judgment on the nuisance count.

Appellants argue further that the trial court erred in equating the standard of proof necessary to establish a non-possessory taking with the standard of proof necessary to establish a nuisance. In granting WSSC's motion for judgment, the trial judge said:

> The second basis upon which I grant the motion on the nuisance, is that the law is set forth not only in [*Maryland Port Admin. v.*] *QC* [*Corp.*, 310 Md. 379, 529 A.2d 829 (1987)], but language in *Electro-*

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[6] There was testimony that at one point steamy and decaying sludge was placed in outdoor football field size piles 15 feet high. Eventually it came to be placed primarily indoors.

> *Nucleonics* [, *Inc. v. WSSC*, 315 Md. 361, 554 A.2d 804, *cert. denied*, 493 U.S. 854, 110 S.Ct. 158, 107 L.Ed.2d 115 (1989)] in that the Court can find no substantial diminution in the use of any of these properties by any of the Plaintiffs as the result of the odor.

The evidence necessary to establish a claim for nuisance is different from that necessary to establish a non-possessory taking. To establish a nuisance claim one must show interference with one's interest in the enjoyment of his/her property, *Exxon Corp. v. Yarema*, 69 Md.App. 124, 148, 516 A.2d 990 (1986); whereas a taking requires that a landowner be deprived of all beneficial use of the land. *Pitsenberger v. Pitsenberger*, 287 Md. 20, 34, 410 A.2d 1052, *appeal dismissed*, 449 U.S. 807, 101 S.Ct. 52, 66 L.Ed.2d 10, *reh'g denied*, 449 U.S. 1028, 101 S.Ct. 601, 66 L.Ed.2d 491 (1980). Thus, an action based on an unconstitutional taking is distinct from a nuisance action. *Bd. of Educ. of Prince George's County v. Mayor and Common Council of the Town of Riverdale*, 320 Md. 384, 388, 578 A.2d 207 (1990). See *Taylor*, 130 Md. 133, 99 A. 900, where the Court of Appeals held that although the defendant's construction of a sewage disposal plant did not result in a taking of plaintiff's property, the defendant could be held liable in damages for nuisance.

In this case, the trial judge's reliance on *QC Corp.* and *Electro-Nucleonics* was misplaced as those cases dealt with non-possessory takings and not nuisance claims. Appellants never claimed in the nuisance count that the operation of Site II constituted a taking of their lands. That argument was made in the other counts. Thus, the trial judge committed error.

II. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT COULD CONSIDER
II. WHETHER WSSC'S USE OF SITE II SUBSTANTIALLY INTERFERED WITH APPELLANTS' USE AND ENJOYMENT OF THEIR LANDS IN DETERMINING THE VALUE OF THE RESTRICTIVE COVENANTS.

The trial judge, relying on *QC Corp.*, instructed the jury that, "[i]n the determination of any changes of value of the Plaintiffs' property, you may consider whether there was substantial interference with the use and enjoyment of the property by Plaintiffs' resulting from extinguishment of the covenants." Appellants argue that the trial court's instruction erroneously suggested that in addition to proving measurable value, they had to prove that an extinguishment of the covenants would "substantially interfere" with the use and enjoyment of their properties.

In *QC Corp.*, the issue was *whether* there was a sufficiently substantial interference with a party's land to effect a non-possessory taking. In the case of *sub judice,* the parties stipulated in open court that the covenants had been extinguished thus, there was no need for the jury to decide if there was a substantial interference with the use and enjoyment of Appellants' land. Therefore, the only issue for the jury to determine was the value of Appellants' covenant rights pursuant to the inverse condemnation claims. Hence, the *QC Corp.* instruction was irrelevant and improper.

III. EVIDENTIARY ISSUES.

Appellants have also raised several other issues relating to the admissibility of certain evidence. Because we have decided to remand this case for a new trial, and in light of the fact that a new trial may proceed in a different fashion, we find it unnecessary to address all of the remaining issues. We believe, however, that in at least one

instance the court committed clear error; therefore, we will comment upon that issue.

A. THE TRIAL COURT'S ADMISSION OF HEARSAY APPRAISALS WAS ERRONEOUS AND PREJUDICIAL.

The appraisals at issue were prepared at the request of AT & T and Computer Entry Systems (now BancTec Systems, Inc.). They were furnished to Appellee during discovery and offered into evidence by Appellee. The trial court admitted these documents, over objection, pursuant to the business records exception to the hearsay rule, codified in section 10-101 of the Maryland Courts and Judicial Proceedings Article (1989). At trial and now on appeal, Appellants contend that not only were the documents not properly authenticated but they contain inadmissible hearsay. We find it necessary to point out that Appellants' hearsay allegation is correct; these appraisals do not qualify as business records.

Section 10-101(b) permits the admission of a business record or writing "made in the regular course of business as a memorandum or record of an act, transaction, occurrence, or event . . . to prove the act, transaction, occurrence, or event." In addition, it must also be "[t]he practice of business . . . to make such written records of its acts at the time they are done. . . ." § 10-101(c). Appellee discussed both the authentication and foundation necessary to admit a business record but failed to address the initial question of whether the appraisals qualify as business records.

Recently, in *Owens-Illinois v. Armstrong*, 87 Md.App. 699, 710-713, 591 A.2d 544, *cert. granted*, 324 Md. 90, 595 A.2d 1077 (1991), we discussed the characteristics of a business record which guarantees its reliability and trustworthiness. It is essential that the business record possess these qualities in order to justify the introduction

of evidence which is generally hearsay in nature. We relied on language from *Palmer v. Hoffman,* 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed 645 (1947), and *Wigmore on Evidence* (1974) for reasons guaranteeing the "circumstantial trustworthiness" of business records.

> According to 5 Wigmore on Evidence § 1522 (1974), the typical record entry made in the regular course of business has a circumstantial guarantee of trustworthiness because:
>
> (1) the needs of the entrant and the business require a habit of accuracy and the influence of this habit may be relied upon to prevent mistakes and counteract the possible temptation to make misstatements purposely;
>
> (2) the regular dependence of the business upon the entries will almost certainly detect any errors or misstatements and thus misstatements can be made safely only by a systematic and comprehensive plan of falsification accomplishable only by the most daring and unscrupulous; or
>
> (3) in addition to the first two reasons, the entrant made the record under a duty to an employer or supervisor and thus is under the additional risks of censure and disgrace for any inaccuracies.

87 Md.App. at 710, 591 A.2d 544.

> Although stated differently, these findings by the Supreme Court are consistent with the reasons for circumstantial trustworthiness set forth in Wigmore. . . . The report was properly exclude because the railroad did not depend on the report . . . to run the daily operation of its railroad business and, thus, it could not be assumed that the report was a product of a necessary habit of accuracy. Moreover, inaccuracies in the report would not have had a detrimental effect on the railroad and therefore would not

> have been detected by the almost continuous use of the information contained therein. Finally, the entrant was not under a duty to a superior to make the report objectively accurate, and thus the report contained the railroad's version of events.

87 Md.App. at 712, 591, A.2d 544.

Business records having these characteristics "which have been found to be admissible . . . are 'payrolls, accounts receivable, accounts payable, bills of lading and the like,'; statements in a medical record . . .; items in a police report which are within the personal observation of the investigating officer; and reports required by law." *Id.* at 710-11, 591 A.2d 544 (citations omitted).

In *Armstrong*, we held that a dust count report made by an engineer at a steel corporation did not meet the criteria of a business record. We opined:

> The investigation and report were not required by law, but were made at the request of one of the company vice-presidents. On its face, the report appears to be a single or, at most irregular, request. Nevertheless, even if dust count reports were made regularly by Bethlehem Steel Corporation, there was nothing to show that they are a necessary component of the daily operation of its business as a steel company. Therefore, the report is not inherently trustworthy as the product of a necessary habit of accuracy, and any inaccuracies would have remained undetected because Bethlehem Steel Corporation did not regularly rely on its contents. Moreover, because Bethlehem Steel Corporation did not apparently depend on the accuracy of the information contained in the report, we cannot infer that the motive behind its creation was objective accuracy rather than the creation of a subjective version of events.

Id. at 712, 591 A.2d 544.

The appraisals in the present case also do not possess the characteristics of a business record. The appraisals were requested by AT & T and BancTec; they were not required by law. Neither company's business required the appraisal in order to function on a day to day basis. Thus, even if they were regularly requested, it would not be the result of a "habit of accuracy". Furthermore, mistakes would not be detected because the companies did not continuously rely on the information contained in the reports. They had no effect on the operation of the business. Therefore, the appraisals do not have the indicia of reliability necessary to qualify under the exception. The court erred in admitting the appraisals which do not qualify as business records.

CROSS APPEAL

I. DID THE TRIAL COURT PROPERLY PERMIT THE JURY TO CONSIDER INVERSE CONDEMNATION CLAIMS OF THOSE APPELLANTS WHO PURCHASED THEIR LAND AFTER THE RESTRICTIVE COVENANTS WERE EXTINGUISHED ON JULY 8, 1980?

Appellee argues that Appellants CAE-Link Corp., BancTec Systems, Inc., and AT & T do not have standing to maintain an inverse condemnation action because they purchased their land in the MIP subsequent to WSSC's July 8, 1980, extinguishment of the covenants. Appellee buttresses this argument by contending that by purchasing their land after July 8th the late-takers could not purchase the extinguished covenant rights because the rights no longer existed. Appellee also argues that the sellers of the land could not convey to the late-takers a greater estate or interest in the land than the seller itself held. Thus, WSSC concludes the owners at the time of the taking, not the present owners, are entitled to compensation.

Appellants, on the other hand, make several opposing arguments. First, they argue that there never was a

"taking" of the covenants, only an extinguishment as a result of the condemnation of Site II. Second, they contend that the covenants were not condemned in 1980, nor have they ever been condemned, thus title to the covenants has not vested in WSSC. Third, Appellants maintain that because compensation has not been paid, the covenants have not been taken. Lastly, Appellants argue that their sellers assigned the covenants and thus, in the alternative, claim the right to maintain suit on the covenants or receive the compensation when its amount is properly determined.

The covenants which the parties agree were breached by operation of Site II provide in part:

> No waste material or refuse may be dumped or permitted to remain in or upon any part of the property outside of buildings.
>
> No omission of objectionable odors outside the lot line shall be permitted. . . .

The covenants also prohibit the use of land in the MIP as a dump or sanitary fill. The parties stipulated that the covenants were extinguished when WSSC began the operation of Site II, *i.e.*, on July 8, 1980. By that stipulation, the parties have agreed that the covenants did not thereafter exist. *See Electro-Nucleonics v. WSSC*, 315 Md. 361, 376, 554 A.2d 804 (1989) (three-year statute of limitations began to run against inverse condemnation action based on loss of benefit of restrictive covenant when servient estate was taken for purposes inconsistent with the covenant). Until such time as the covenants were breached by WSSC, and extinguished by virtue of the breach, no cause of action could arise. It was only upon and subsequent to that extinguishment that the right to compensation arose. Accordingly, at that point, July 8, 1980, the then owners had a chose in action.

In the case *sub judice*, CAE-Link's predecessor in interest, the Singer Company, contracted to purchase its

land by an Agreement dated September 30, 1980. That agreement does not contain any express assignment of any chose in action which then existed. It purported to convey all rights to compensation from "taking" on or after that date.

> Loss or damage to the Property . . . as a result of the exercise of the power of eminent domain . . . *between the date of this Contract and the time of settlement* shall not void or impair this Contract, but Purchaser, upon completing settlement, shall be entitled to the eminent domain award or compensation . . . and to an assignment of all claims to such compensation or award. . . . [Emphasis added.]

The parties have stipulated that the covenants had already been extinguished by September 30, 1980. Similarly, BancTec's predecessor in interest, Computer Entry Systems ("CES"), contracted to purchase its property by a Purchase Agreement. The Sales Contract contains a provision virtually identical to that found in the Singer contract relating to the purchaser's entitlement to any eminent domain award or compensation in the future. The date of that agreement was also subsequent to July 8, 1980. Therefore, that language, as to eminent domain, was not intended to relate to the prior exercise of eminent domain (inverse condemnation), but applied to any subsequent exercise of such power. Thus, as to CAE-Link and BancTec, no proper assignment of the right to maintain an action in inverse condemnation was made.

As to AT& T, the documents in its chain of title show that the inverse condemnation claim was purportedly assigned to it by its predecessor, SDL/Data Crown, Inc. In the Agreement of Purchase and Sale dated March 15, 1984, between AT & T and SDL/Data Crown, an inverse condemnation claim was expressly assigned to AT & T. Paragraph 3.6 of this Agreement provides, in pertinent part:

> Seller has a claim against the Washington Suburban Sanitary Commission for damages resulting from the operation of a facility for the storage and processing of sewerage sledge [sic]. Seller hereby agrees to authorize Purchaser to use its name in prosecution of said claim, at Purchaser's sole expense, and Purchaser shall be entitled to any and all proceeds of said claim.

Thus, if SDL/Data Crown, itself had the chose in action, AT & T would have received it. SDL/Data Crown received the property by deed dated October 1, 1981. That deed contained no reference to any assignment of a chose in action by SDL/Data Crown's predecessor, Crown Life Insurance, the entity that possessed the property on July 8, 1980. Thus, SDL/Data Crown did not possess that which it purported to convey to AT & T in that SDL/Data Crown had no right to maintain the suit.[7] The trial court erroneously concluded that CAE-Link, BancTec and AT & T had standing to prosecute the inverse condemnation claims in this case. We thus shall reverse its denial of WSSC's motion for partial summary judgment as to the inverse condemnation counts as they relate to CAE-Link, BancTec and AT & T.

As we have held that the trial court should have dismissed AT & T's inverse condemnation claim upon WSSC's Motion for Partial Summary Judgment, we shall not address the issue of limitations.

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[7] The deeds of the respective parties contained standard "together with" clauses. Generally "together with" clauses convey rights still attached to the land being conveyed. Once a covenant is extinguished, it cannot be conveyed because it does not exist. Under the circumstances of this case, the owner, at the time of the extinguishment, became possessed of a chose in action for damages. That chose in action was not then incidental to an existing property right, it had independent existence. In the case at bar, the possessors of the chose in action, as far as the record reflects, have not assigned that right.

JUDGMENT DENYING WSSC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE INVERSE CONDEMNATION COUNTS AGAINST CAE-LINK, BANCTEC, AND AT & T IS REVERSED; JUDGMENT ON REMAINING ISSUES VACATED; CASE REMANDED FOR NEW TRIAL; COSTS TO BE PAID 75% BY WSSC, 25% BY CAE-LINK, BANCTEC AND AT & T.

APPENDIX C

Filed: 08/01/90

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, MARYLAND

Civil No. 56245

WASHINGTON SUBURBAN SANITARY COMMISSION,
Plaintiff

v.

MORRIS FRANKEL, *et al.*,
Defendants

ORDER

Having considered the memoranda filed by the parties on the issue of strict liability with respect to the nuisance claim, it is this 31st day of *JULY, 1990,* by the Circuit Court for Montgomery County, Maryland.

ORDERED, that plaintiff and counterdefendant's Motion for Partial Summary Judgment be, and is hereby, GRANTED as to the issue of strict liability; and, it is further

ORDERED, that the defendant and counterplaintiffs' may proceed on a negligence theory with regards to the nuisance claim.

/s/ Paul H. Weinstein
PAUL H. WEINSTEIN, Judge
Circuit Court for Montgomery
County, Maryland

APPENDIX D

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 80-1653, 80-1654, 80-1718, 80-1719,
80-1495 and 80-1496

UNITED STATES OF AMERICA

v.

DISTRICT OF COLUMBIA, *et al.*

Appeal of Prince George's County, Maryland
(Intervenor-deft.)

STATE WATER CONTROL BOARD *et al.*

v.

WASHINGTON SUBURBAN SANITARY COMMISSION *et al.*

Appeal of Prince George's County, Maryland
(Intervenor-deft.)

STATE WATER CONTROL BOARD,
An Agency of the Commonwealth of Virginia, *et al.*

v.

WASHINGTON SUBURBAN SANITARY COMMISSION *et al.*

Appeal of Prince George's County, Maryland
(Intervenor-deft.)

UNITED STATES OF AMERICA

v.

DISTRICT OF COLUMBIA *et al.*

Appeal of Prince George's County, Maryland

STATE WATER CONTROL BOARD *et al.*

v.

WASHINGTON SUBURBAN SANITARY COMMISSION *et al.*

Appeal of Prince George's County, Maryland

UNITED STATES OF AMERICA

v.

DISTRICT OF COLUMBIA *et al.*

Appeal of Prince George's County, Maryland

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action Nos. 77-1929 and 1813-73)

Argued April 9, 1981

Decided June 10, 1981

As Amended July 29, 1981

Frank W. Stearns and David T. Stitt, Asst. County Attys., Farfax, Va., also entered appearances for appellees, Fairfax County, Va.

Judith W. Rogers, Corp., Counsel, Joyce M. Notarius, Richard G. Wise and Edward L. Curry, Assistant Corp. Counsel, Washington, D.C., were on the brief for appellee, District of Columbia.

Robert B. Ostrom, County Atty., Prince George's County, Upper Marlboro, Md., with whom Richard S. Alper and Robert H. Drummer, Associate County Attys., Washington, D.C., were on the brief for appellant.

Thomas A. Deming, Asst. Atty. Gen., State of Md., Annapolis, Md., for appellee, State of Md.

John P. Arness, Washington, D.C., with whom Curtis E. von Kann, Allan D. Windt and Henderson J. Brown, IV, Washington, D.C., were on the brief for appellee, Washington Suburban Sanitary Commission.

Rosanne Mayer, Atty., Dept. of Justice, Washington, D.C., with whom James W. Moorman, Asst. Atty. Gen., Anne S. Almy and Patrick J. Cafferty, Jr., Atty., Dept. of Justice, Washington, D.C., were on the brief, for appellee, United States. Angus Macbeth and Donald W. Stever, Atty., Dept. of Justice, Washington, D.C., also entered appearances for appellees, United States.

Marshall Coleman, Atty. Gen., James E. Ryan, Jr., Deputy Atty. Gen., and Frederick S. Fisher, Asst. Atty. Gen., Com. of Va., Richmond, Va., were on the brief for appellee, Com. of Va., State Water Control Bd.

Robert G. Tobin, Jr., Deputy County Atty., Nathan J. Greenbaum, Asst. County Atty., Montgomery County, Rockville, Md., were on the brief for appellee, Montgomery County, Md.

Before McGOWAN, TAMM, and WALD, Circuit Judges.

Opinion for the Court filed by Circuit Judge WALD.

WALD, Circuit Judge:

This appeal is the latest chapter in an eight-year-old controversy concerning disposal of sewage sludge generated at the Blue Plains Sewage Treatment Plant in the District of Columbia. Since the early 1970's, the parties to this appeal have struggled to devise a plan for sludge disposal at sites within the Washington area jurisdictions which use the Blue Plains facility. Appellant Prince George's County (P.G. County") opposes appellee Montgomery County's selection of one such site ("Site 2") for its sludge disposal. The district court, however, endorsed the selection of Site 2 in 1978 and ordered the budgeting of funds for its implementation on April 25, 1980, and June 4, 1980. In an effort to block that implementation, P. G. County then instituted a series of state court actions. The district court responded by enjoining further state court proceedings on June 27, 1980. P. G. County argues here that the district court orders of April 25 and June 4 exceeded the court's authority under the Clean Water Act, and that the order of June 27, 1980, violates the Anti-Injunction statute. For the reasons stated below, we disagree.

I. BACKGROUND

On September 24, 1973, the Virginia Water Control Board, Fairfax County, and the District of Columbia brought suit in the United States District Court for the District of Columbia against the Washington Suburban Sanitary Commission ("WSSC")[1] (Civil Action No. 1813-73). The complaint alleged that WSSC, in violation of regional agreements, was exceeding its allotted use

[1] The WSSC is an agency formed under the laws of Maryland to serve the sewage and water supply needs of Montgomery and Prince George's Counties. The Commission's policies are determined by six Commissioners, three from each county. *See* Section 1-1 of the WSSC Code. Budgets adopted by the WSSC are subject to the approval of both county governments. Section 1-4, 7-1.

of the Blue Plains sewage treatment plant in D.C., thus causing the plant to discharge inadequately treated sewage into the Potomac River.

The United States intervened as a party-plaintiff, alleging that excess flow from the WSSC was causing pollution of the Potomac in violation of the Federal Water Pollution Control Act of 1970, 33 U.S.C. § 1251 *et seq.* Montgomery County, P. G. County, and the State of Maryland intervened as parties defendant. Plaintiffs then amended their complaint to request that P. G. and Montgomery Counties be ordered to comply with another provision of the regional agreement by designating and providing sites for the disposal of sludge [2] generated at the Blue Plains facility.

Prior to trial the parties entered into the Blue Plains Sewage Treatment Plant Agreement, which was subsequently incorporated into a Consent Decree dated July 29, 1974. The decree provided that the court would retain jurisdiction to enforce the agreement and required court approval for any modification of it. The agreement established limits on flows to the plant and provided that the user jurisdictions in the Washington metropolitan area would devise a permanent equitable plan for the disposal of sludge produced at Blue Plains by June 30, 1976, and would implement the plan by December 31, 1977. During the interim period the parties agreed to dispose of sludge in proportion to their share of sewage flow to the plant.

Despite the requirements of the Consent Decree, the parties failed to agee on a permanent sludge disposal plan. On the eve of the expiration date for the interim plan,

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[2] Sludge is the byproduct of the sewage treatment process. Disposal methods include entrenchment in designated areas and the composting process for which Site 2 was designated. The end product of composting may be used as a fertilizer or compost. The 1974 agreement contemplated that the Blue Plains plant would generate 2,400 tons per day of sludge requiring disposal. Joint Appendix at 108.

the United States filed a complaint in district court (Civil Action No. 77-1929) on November 9, 1977, alleging that the District of Columbia, the WSSC, Montgomery County, P. G. County, and Fairfax County had violated the court's 1974 order by failing to devise a permanent sludge management plan. The complaint further alleged that the impasses over sludge disposal would cause the Blue Plains plant to curtail or eliminate treatment of sewage, thus resulting in increased discharges of pollutants into the Potomac River in violation of the Federal Water Pollution Control Act. Like its predecessor, the 1977 suit led to negotitions culminating in a consent order, dated January 24, 1978, which extended the date of the interim period under the 1974 agreement to September 21, 1978, and extended the deadline for submission of a permanent sludge plan to January 15, 1978.

The user jurisdictions again failed to agree on a permanent plan. On May 18, 1978, upon motion of the United States and after hearing, the district court entered an order requiring each jurisdiction to file a report designating a site within its boundaries for disposal of sludge. Montgomery County submitted a report designating two sites for disposal of raw sludge, one of which was an underdeveloped tract of land adjacent to the Montgomery Industrial Park on the Montgomery County-Prince George's County border (Site 2). Site 2 was designated as a composting site, where sludge would be mixed with wood chips and aerated for periods of 35-45 days. The Calverton Citizens Association, representing residents of the area surrounding Site 2, submitted a report to the court, alleging that the proposed use of Site 2 would subject them to a health hazard.

On July 10, 1978, the court entered an order requiring the user jurisdictions to proceed to develop their designated sites for sludge disposal. In particular, Montgomery County was ordered to have the Site 2 composting facility operational by July 1, 1979. The court ordered WSSC

to take all necessary action, including acquisition of property rights and obtaining all necessary permits. The court also ordered that the user jurisdictions take no action unrelated to protection of the public health to prevent the sludge disposal measures ordered. Noting the concerns expressed by the Calverton Citizens Association, the court ordered that Montgomery County through the WSSC take all measures necessary to protect the public health in the implementation of Site 2. P. G. County, which had made known its objections to Site 2 in a letter to the court dated Jnne 28, 1978, did not appeal the July 10 order.[3]

The WSSC and Montgomery County then proceeded with the development of Site 2 as required by the 1978 order. The WSSC filed condemnation proceedings to acquire Site 2 in the Circuit Court for Montgomery County, and obtained the requisite permit from the Maryland Department of Health and Mental Hygiene. In May 1979 the WSSC adopted a budget for fiscal year 1980 which included $16.9 million for the acquisition and construction of the Site 2 facility.

P. G. County opposed implementation of Site 2 on several fronts outside the forum of the district court. The County unsuccessfully appealed the issuance of the health permit to the Board of Review of the Maryland State Health Department. It also brought suit in the Circuit Court for Prince George's County seeking to enjoin acquisition of Site 2 on grounds it had never given the requisite approval to WSSC funds allotted to Site 2.[4] The Circuit Court dismissed the complaint, and P. G. County appealed.

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[3] The District of Columbia appealed that portion of the July 10 order requiring it to construct a compost facility at the Blue Plains plant. This court affirmed the contested portion of the order in an unpublished opinion. *State Water Control Bd. v. Washington Suburban Sanitary Commission*, 600 F.2d 281 (D.C.Cir.1979).

[4] Prince George's County v. WSSC, No. E-7692 (Circuit Court for Prince George's County, Maryland, filed Nov. 27, 1979).

In March 1980 implementation of Site 2 encountered more severe obstacles. First, the three WSSC Commissioners from P. G. County blocked funding for Site 2 in WSSC's budget for fiscal year 1981. In addition, the WSSC learned that a title search of the Site 2 land conducted in connection with the condemnation proceeding had revealed that the land was burdened by restrictive covenants [5] which appeared inconsistent with a compost facility and which might cost millions of dollars to acquire. By letter dated March 18, 1980, the WSSC informed the district court of the budget impasse and the covenants.

Montgomery County then filed a motion in district court on April 4 to compel the WSSC to restore funds for Site 2 to its budget. After a hearing at which P. G. County opposed the motion, the court issued on order on April 25 requiring the WSSC to restore the funds and to take all actions necessary to place Site 2 into operation at the earliest practicable date. On May 8 P. G. County noted an appeal from this order, the first of this group of consolidated cases.

Despite the April 25 order, the three P. G. County WSSC Commissioners declined to vote to reinsert funds for Site 2 in the budget. Consequently on May 14, 1980, Montgomery County moved the district court to cite the three Commissioners for contempt. The Commissioners defended on grounds that the restoration of funds ordered on April 25 was a purely ministerial act which required no Commission vote. After a hearing the district court on June 4 denied the contempt motion but, finding that reinsertion of the funds was a ministerial act, ordered the

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[5] The covenants preclude use of the land in any manner which would create objectionable odors, generate dense smoke or high levels of noise, or constitute a "dump or sanitary landfill." P.G. County agreed that because the covenants run not only to owners of adjacent properties but also to property owners "in the general neighborhood," a lengthy judicial determination of the composition of the protected class would be required.

General Manager of the WSSC to perform it. On June 5 P. G. County sought a stay from the district court of its April 25 and June 4 orders, and on June 10 it noted an appeal from the June 4 order.[6] The district court denied the motion for stay on June 19.

Meanwhile P. G. County had filed two new suits in state court seeking to block implementation of the Site 2 facility. One suit alleged that the state sewage sludge permit was invalid and that Site 2 constituted a prospective nuisance.[7] The second suit alleged that because of the restrictive covenants, acquisition of Site 2 would be so costly as to render the WSSC Commissioners liable for breach of fiduciary duty.[8] In this second suit, the Prince George's County Circuit Court on June 17, 1980, issued a temporary injunction forbidding the WSSC from proceeding with the acquisition of Site 2 and ordering it to withdraw a purchase offer it had made to the owners.

WSSC then moved in the district court for an order to protect and effectuate the court's prior judgments, orders and decrees. Following a hearing, the district court on June 27 issued an order which enjoined WSSC from complying with the state court order and further ordered WSSC to proceed expeditiously with development of Site 2; ordered P. G. County to withdraw from the three state court suits relating to Site 2; enjoined all parties from initiating any state court proceeding which would frustrate the district court's orders; and ordered any party believ-

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[6] On November 19, 1980, a motions panel of this court summarily affirmed that portion of the June 4 order which declined to hold the P.G. Commissioners in contempt. *See United States v. District of Columbia*, No. 80-1495 (D.C.Cir. Nov. 19, 1980) (per curiam order).

[7] *Calverton County Association v. Buck*, No. E-70934 (Circuit Court for Montgomery County, Maryland, filed April 16, 1980).

[8] *Prince George's County v. WSSC*, No. E-8512 (Circuit Court for Prince George's County, Maryland, filed April 16, 1980).

ing modification of the court's order was required to seek such modification only in the district court or in this court.

The last of this group of consolidated cases is P. G. County's appeal of the June 27 order. P. G. County's request for a stay of the order was denied first by the district court on the same day and then by this court on July 3. Two such requests for stay were later denied by the Supreme Court. WSSC has proceeded to comply with the April 25 and June 4 orders, has acquired legal title to Site 2 and has let contracts for the construction of the compost facility.

II. ANALYSIS

A. Tenth Amendment Objections

P. G. County argues that the three challenged district court orders violate principles of federalism embodied in the tenth amendment and affirmed in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). Appellant alleges that the April 25 and June 4 orders of the district court usurped the power of the WSSC to control its own budget, thereby intruding upon an integral function of a state agency. It further alleges that the June 27 order, by prohibiting further collateral challenges to Site 2 in state courts, usurped the power of the state of Maryland to protect the public health and safety of its citizens. Arguing that the Clean Water Act allocated the primary responsibility for eliminating water pollution to the states, appellant concludes that the broad control over the development of Site 2 asserted by the district court exceeded both its powers under the act and its equity jurisdiction. We find these arguments without merit.

In *National League of Cities v. Usery*, the Supreme Court held that extension of the Fair Labor Standard Act's minimum wage and maximum hour provisions to state employees was an impermissible exercise of the com-

merce power because it impaired state sovereignty guaranteed by the tenth amendment. In a plurality opinion the Court held that the power to determine the wages and hours of employees was an "integral" state function, essential to the separate and independent existence of the states. Justice Blackmun, concurring, interpreted the plurality opinion as mandating a balancing approach, protecting states from federal intrusion only where the federal interest did not outweight the state interest. Justice Blackmun thought it apparent that *National League of Cities* "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state compliance with imposed federal standards would be essential." 426 U.S. at 856, 96 S.Ct. at 2476.

We agree that whatever the precise limits of the state sovereignty doctrine set forth in *National League of Cities*,[9] it clearly does not control where, as here, the

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[9] The lower courts have limited *National League of Cities* to legislation which is based on the commerce clause. Thus the Second Circuit has held that the Federal Railway Labor Act, which permits strikes by railroad employees, must yield under *Usery* to a state statute barring strikes by public employees, *see United Transportation Union v. Long Island Rail Road Co.*, 634 F.2d 19 (2d Cir. 1980), and the Sixth Circuit has held that employees of a municipal airport were not covered by the Fair Labor Standards Act because operation of the airport was an integral function of city government, *see Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979). *Compare State of New Hampshire v. Marshall*, 616 F.2d 240 (1st Cir.), *appeal dismissed*, 449 U.S. 806, 101 S.Ct. 53, 66 L.Ed.2d 10 (1980) (rejecting tenth amendment challenge to amendments to Federal Unemployment Tax Act extending benefits to state employees on grounds that statute was enacted under spending power, not commerce power); *Cantwell v. County of San Mateo*, 631 F.2d 631 (9th Cir. 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 1703, 68 L.Ed.2d 199 (1981) (holding federal statute governing retirement pay for reserve military personnel must prevail over state statute, despite *Usery*, because federal statute enacted under Congressional war power); *Usery v. Charleston County School District*, 558 F.2d 1169 (4th Cir. 1977); and *Usery v.*

federal interest has long been recognized as overriding.[10] The Supreme Court has recently described the 1972 amendments to the Federal Water Pollution Control Act as "a comprehensive program for controlling and abating water pollution." *City of Milwaukee v. Illinois*, —— U.S. ——, 101 S.Ct. 1784, 1793, 68 L.Ed.2d 114 (1981) (*quoting Train v. City of New York*, 420 U.S. 35, 37, 95 S.Ct. 839, 841, 43 L.Ed.2d 1 (1975)). While it is clear that Congress contemplated that the states would play an active role in this effort, it is equally clear it did not contemplate that a subdivision of one state would have the power to block a regional plan for sewage disposal, thereby causing injury not only to its own state government but to neighboring states as well. *Cf. United States v. Duracell International, Inc.*, 510 F.Supp. 154

Allegheny County Institution District, 544 F.2d 148 (3d Cir. 1976), *cert. denied sub nom. Allegheny County Institution District v. Marshall*, 430 U.S. 946, 97 S.Ct. 1582, 51 L.Ed.2d 793 (1977) (rejecting tenth amendment challenges to application of Equal Pay Act to state and local governments on grounds Act was exercise of Congressional power under fourteenth amendment).

[10] In *Illinois v. City of Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972), the Court, in an opinion recognizing the existence of a federal common law concerning interstate water pollution, stated:

> The Federal Water Pollution Control Act in § 1(b) declares that it is federal policy "to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution." But the Act makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters.

Id. at 102, 92 S.Ct. at 1392 (footnote omitted). Subsequent to the Court's decision in *Illinois v. City of Milwaukee*, Congress expanded federal statutory control over water pollution by enacting the Federal Water Pollution Control Act Amendments of 1972. The Court has recently held that those amendments were so comprehensive as to preempt federal common law in that area. *See City of Milwaukee v. Illinois*, —— U.S. ——, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981).

(M.D.Tenn.1981) (rejecting tenth amendment challenge to provision of Clean Water Act holding liable any state which prevents municipality from complying with Act).

The courts have recognized the breadth of this federal interest and have upheld federal environmental legislation which, like the Clean Water Act, requires state implmentation while leaving the states latitude to make essential choices. *See United States v. Ohio Department of Highway Safety*, 635 F.2d 1195 (6th Cir. 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 2031, 68 L.Ed.2d 334 (1981) (upholding authority of EPA under Clean Air Act to require a state to deny registration to vehicles which have not passed mandatory inspection); *District of Columbia v. Train*, 521 F.2d 971 (D.C.Cir.1975), *vacated as moot sub nom. EPA v. Brown*, 431 U.S. 99, 97 S.Ct. 1635, 52 L.Ed.2d 166 (1977) (same).[11] When necessary the courts have exercised broad equitable powers to ensure state compliance with federal environmental

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[11] At issue in *District of Columbia v. Train* was an EPA transportation control plan under the Clean Air Act for the National Capital Region. This court affirmed the regulations in part but struck down a portion of the plan which required area jurisdictions to adopt automobile inspection and maintenance programs and to retrofit certain vehicles with pollution control devices. The court held that that portion of the regulations, by substituting compelled state regulation for permissible federal regulation, exceeded the scope of the commerce power, 521 F.2d at 992, and was such a "drastic" invasion of state sovereignty as to violate the tenth amendment, *id.* at 994. Appellant invokes *Train* to argue that the district court orders in this case are likewise an impermissibly "drastic" invasion of state sovereignty. We find the analogy unpersuasive. The *Train* court emphasized that the regulations invalidated there forced "unconsenting" states to administer and enforce a federal program. *Id.* at 992. In this case, however, appellant, along with other area jurisdictions, entered into a consent decree and agreed that the district court should retain power to enforce it. In addition, the nature of state action required by the district court in this case is significantly less intrusive on state sovereignty than the ongoing state regulatory program invalidated in *Train*.

laws, even where the exercise of such powers has necessitated the bypassing of normal state decisional processes. Thus after Detroil failed to comply with a consent decree concerning sewage disposal, the district court appointed the Mayor of Detroit as administrator of the treatment plant, and directed him to act "without the necessity of any actions on the part of the Common Council of the City of Detroit when in the judgment of the Administrator the same might unavoidably delay or impede" compliance. *United States v. City of Detroit,* 476 F.Supp. 512, 515 (E.D.Mich.1979); *cf. Washington v. Washington State Commercial Passenger Fishing Vessel Assn.,* 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) (sanctioning district court's direct supervision of state fisheries where necessary to secure compliance with its order recognizing Indian rights).

The weakness of appellant's federalism argument is underscored by the fact that it, along with other regional jurisdictions, agreed that the district court should have continuing authority to enforce the 1974 consent decree. P. G. County voluntarily intervened in the initial suit in 1973 and was a signatory to the consent decree which emerged from that suit. Like the other parties to that agreement, appellant failed to comply with the deadlines it had agreed to meet, thereby necessitating enforcement of the agreement by the district court. The tenth amendment cannot be used to bar the very enforcement mechanism agreed to in 1974. *Cf. Brown v. Neeb,* 25 Fair Empl. Prac.Cases 267 (Lab.Rel.Rep.BNA), 644 F.2d 551 (6th Cir. 1981) (affirming district court order requiring city, which had ordered layoffs from fire department due to budget crisis, to comply with prior consent decree concerning hiring of minorities by making layoffs proportionate to racial composition of the department, even though collective bargaining agreement and state law provided that layoffs should be on basis of seniority).

Thus we find that the district court did not exceed its statutory or equitable authority and that no interest protected by the tenth amendment has been infringed.

B. Anti-Injunction Act Objections

Appellant's second contention is that the district court's order of June 27 violates the Anti-Injunction Act, 28 U.S.C. § 2283, which provides:

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Supreme Court has noted that the purpose of the Act, which rests on the fundamental constitutional independence of the states and their courts,[12] is to prevent "needless friction between state and federal courts." [13] The Court has applied the Act strictly,[14] stating that it is an "absolute prohibition" against any injunction of any state court proceedings that does not fall within one of the three specifically defined exceptions in the Act.[15] The

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[12] *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287, 90 S.Ct. 1739, 1743, 26 L.Ed.2d 234 (1970).

[13] *Mitchum v. Foster*, 407 U.S. 225, 233, 92 S.Ct. 2151, 2157, 32 L.Ed.2d 705 (1972), *quoting Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9, 60 S.Ct. 215, 218, 84 L.Ed. 447 (1939).

[14] 7 Moore's Federal Practice ¶ 60.39[2], at 657 (2d ed. 1979).

[15] *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630, 97 S.Ct. 2881, 2887, 53 L.Ed.2d 1009 (1977). The United States has argued before this court that the Act does not apply where, as here, one of the litigants seeking to enjoin state proceedings is the federal government. The Supreme Court so held in two cases, reasoning that the policy behind the Act is far less compelling where a stay is sought to protect "superior federal interests." *See National*

issue for decision, then, is whether the June 27 order falls within one of the three exceptions.

The district court relied primarily, as do appellees before this court, on the last of the three exceptions, which permits a federal court to enjoin a state proceeding in order to "protect or effectuate" its judgments.[16] Known as

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Labor Relations Bd. v. Nash-Finch Co., 404 U.S. 138, 146, 92 S.Ct. 373, 378, 30 L.Ed.2d 328 (1971); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 226, 77 S.Ct. 287, 291, 1 L.Ed.2d 267 (1957). The status of this implied exception is left unclear in other decisions of the Court which stress that the three specific statutory exceptions are exclusive and "should not be enlarged by loose statutory construction." *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287, 90 S.Ct. 1739, 1743, 26 L.Ed.2d 234 (1970). Because this issue is raised for the first time on appeal and because its resolution is unnecessary to our disposition of this case, we express no view on whether the participation of the federal government in this case renders § 2283 inapplicable.

[16] The district court also adverted to, and the appellees secondarily rely on, the second exception, which permits an injunction "in aid of" the federal court's jurisdiction. The Reviser's Note to § 2283 states that the "in aid of" language was intended "to conform to section 1651 of this title [the All Writs Act, 28 U.S.C. § 1651] and to make clear the recognized power of the Federal courts to stay proceedings in state cases removed to the district courts." The "in aid of" exception has also been construed to allow a federal court to protect its prior jurisdiction over a res by enjoining a state proceeding that interferes therewith. 1A Moore's Federal Practice ¶ 0.225, at 2617 (2d ed. 1981); 17 Wright, Miller & Cooper, Federal Practice and Procedure § 4225 (1978). Professor Wright has suggested that the "in aid of" exception also encompasses cases "where a district court has taken a controversy in hand and will exercise continuing jurisdiction," *id.*, reasoning that state court intervention in such a controversy would seriously impair the power of the district court to decide the case, and citing *Swann v. Charlotte-Mechlenburg Board of Education*, 501 F.2d 383 (4th Cir. 1974), and *Grenchik v. Mandel*, 373 F.Supp. 1298 (D.Md.1973). Because the Supreme Court has indicated that there is some overlap between the "protect or effectuate" and "in aid of" exceptions, *see Atlantic Coast Line Railroad Co. v. Brother-*

the "relitigation" exception, the "protect or effectuate" language was intended to affirm the power of federal courts to enjoin the relitigation of cases and controversies fully adjudicated by such courts.[17] The Supreme Court has construed the exception to mean that a state court may be prevented "from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 295, 90 S.Ct. 1739, 1747, 26 L.Ed.2d 234 (1970).

Appellant argues that this exception should be read narrowly to permit an injunction only where the state proceeding involves the same cause of action as did the federal proceeding. Appellant contrasts the cause of action in the federal suit, to ensure compliance with the Clean Water Act by providing for sludge disposal, with the causes of action in the enjoined state proceedings, which involve issues such as compensability of restrictive covenants under Maryland property law. Appellant concludes that the state suits are collateral to, rather than duplicative of, the federal suit and that therefore the relitigation exception does not apply.

We believe, however, that *Atlantic Coast Line* mandates an examination of the effect a state proceeding would have on a prior federal judgment, rather than a comparison of formal causes of action. Where a state court enjoins a course of conduct which is necessary to

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hood of Locomotive Engineers, 398 U.S. 281, 295, 90 S.Ct. 1739, 1747, 26 L.E.2d 234 (1970), we believe that either of the exceptions provides ample jurisdiction for the June 27 order.

[17] Reviser's Note to 28 U.S.C. § 2283. The exception was intended to overrule *Toucey v. New York Life Insurance Co.,* 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941), in which the Supreme Court had held that federal courts lacked the power to enjoin relitigation in state court of controversies adjudicated in federal court.

comply with a prior federal court order, the federal court has authority to effectuate its order by enjoining the state proceeding. In *Doe v. Ceci,* 517 F.2d 1203 (7th Cir. 1975), a federal district court had enjoined a county hospital from refusing to permit its medical personnel to perform elective abortions within the hospital. Subsequently a state court entered an order restraining county officials from disbursing any county funds for elective abortions. The district court enjoined enforcement of the state court order and the Seventh Circuit affirmed on grounds that such action was "necessary to effectuate the earlier order of the federal court and thus not in contravention of 28 U.S.C. § 2283." *Id.* at 1204. *See also Henry v. First National Bank of Clarksdale,* 595 F.2d 291, 306-07 (5th Cir. 1979), *cert. denied sub nom. Claiborne Hardware Co. v. Henry,* 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980); *Thomason v. Cooper,* 254 F.2d 808 (8th Cir. 1958); *Baker v. Gotz,* 415 F.Supp. 1243 (D.Del.), *aff'd mem.,* 546 F.2d 415 (3d Cir. 1976). Thus the district court plainly acted within its authority in enjoining the WSSC from complying with the June 17 order of the Circuit Court for Prince George's County.

The State of Maryland, while acknowledging the power of the district court to stay the Prince George's Circuit Court injunction, joins appellant in arguing that the June 27 order was overly broad in enjoining both pending state proceedings which had not progressed to final judgment and prospective state litigation concerning Site 2. The law is clear, however, that a federal court is not required to await a final judgment by a state court before acting to protect its own decrees.[18]

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[18] In *Brown v. O'Brien,* 469 F.2d 563 (D.C.Cir.), *vacated as moot,* 409 U.S. 816, 93 S.Ct. 67, 34 L.Ed.2d 72 (1972), the Credentials Committee of the Democratic Party had ruled that challenged delegates from Illinois should be unseated and replaced. The unseated delegates challenged this action in suits filed in both state and federal court. In the federal suit, the defendant Democratic Party

Where proceedings in a federal court have been ongoing for several years, as they have here, state proceedings which would frustrate the federal court's effective disposition of the case have frequently been enjoined even where the state proceedings have not yet progressed to final judgment. Many of these cases have involved school desegregation orders. *See Swann v. Charlotte-Mecklenburg Board of Education*, 501 F.2d 383 (4th Cir. 1974); *Grenchik v. Mandel*, 373 F.Supp. 1298 (D.Md.1973).[19] In *New York State Association for Retarded Children, Inc. v. Carey*, 456 F.Supp. 85 (E.D.N.Y.1978), the district court enjoined a state proceeding which would have interfered with its disposition of a civil rights case over which it had acquired jurisdiction five years earlier, noting that the state court plaintiffs' claims would properly have

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filed a counterclaim, seeking to enjoin prosecution of the state court action. The district court upheld the action of the Credentials Committee but denied an injunction. This court affirmed the judgment dismissing the complaint but remanded for an injunction against the state court proceeding, finding that an injunction was necessary to prevent the state court from "taking any action in any other court that would impair the effectiveness and the integrity of the judgments of this Court." 469 F.2d at 574. *See also Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855, 94 S.Ct. 157, 38 L.Ed.2d 105 (1973).

[19] Appellant argues that the foregoing cases are distinguishable because they involve protection of individual constitutional rights, as to which the federal injunctive power is singularly broad. Whatever the validity of this suggestion as a general proposition, it has no relevance in the context of § 2283, which allows a federal court to enjoin state proceedings in order to "protect or effectuate" its judgments in any type of proceeding. *See Samuel C. Ennis & Co. v. Woodmar Realty Co.*, 542 F.2d 45 (7th Cir. 1976), *cert. denied*, 429 U.S. 1096, 97 S.Ct. 1112, 51 L.Ed.2d 543 (1977) (action in state court against trustee in bankruptcy enjoined by federal court which had conducted bankruptcy proceeding years earlier); *Baker v. Gotz*, 415 F.Supp. 1243 (D.Del.), *aff'd mem.*, 546 F.2d 415 (3d Cir. 1976) (enjoining state court sequestration of notes which conflicted with prior district court determination that sequestration was not an available remedy).

been brought before the federal court. *Id.* at 97. In this case, too, we believe that if P. G. County believed changed circumstances required modification of the 1978 order, it was obligated to seek such modification in the district court, which ordered the implementation of Site 2 in 1978.

Thus we conclude that it was within the district court's discretion to enjoin P. G. County's participation in the three pending proceedings in Maryland state courts in which the relief sought would have frustrated the district court's "flexibility and authority" to enforce its 1978 order. The injunction against prospective state court litigation concerning Site 2, being outside the scope of § 2283,[20] is likewise valid. In sum, we find no violation of the Anti-Injunction Act or of equitable principles in the June 27 injunction order.

III. CONCLUSION

We find that neither the tenth amendment nor the Anti-Injunction Act was violated by the three district court orders challenged here. We also find appellant's other arguments, that evidentiary hearings were required before issuance of the orders and that the June 27 injunction was unwarranted under traditional equitable criteria, without merit. We believe that the actions taken by the district court were necessary to effectuate its 1978 order and to ensure the long overdue implementation of a regional sludge management plan. Accordingly, the judgment of the district court is

Affirmed.

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[20] Section 2283 bars injunctions only to existing state court proceedings and has no application before such proceedings have begun. In a case where equitable principles warrant relief, a party may be enjoined from instituting proceedings in a state court. 1A Moore's Federal Practice ¶ 0.208[3-.1], at 2316 (2d ed. 1981); 17 Wright, Miller & Cooper, Federal Practice and Procedure § 4222 (1978).